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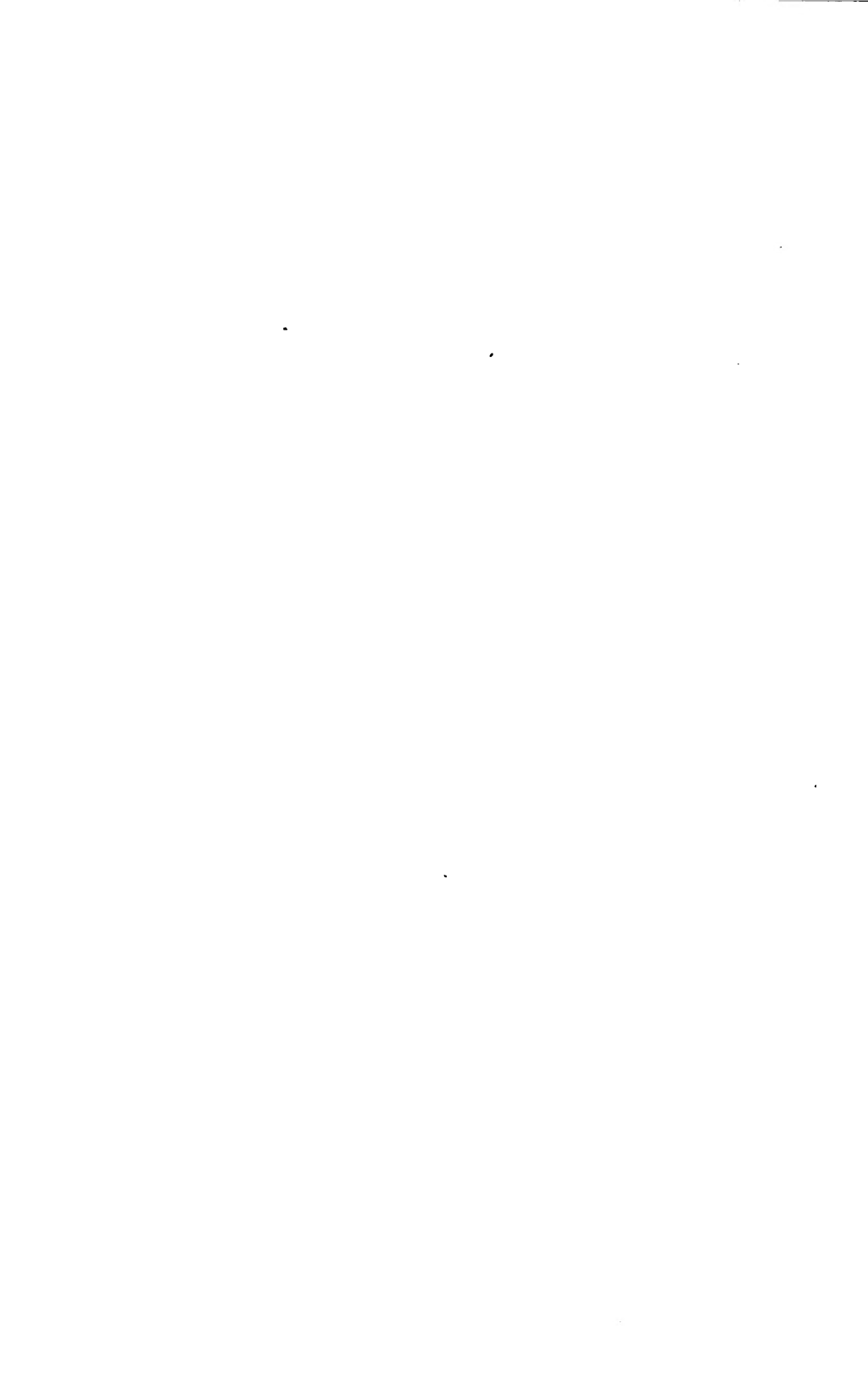


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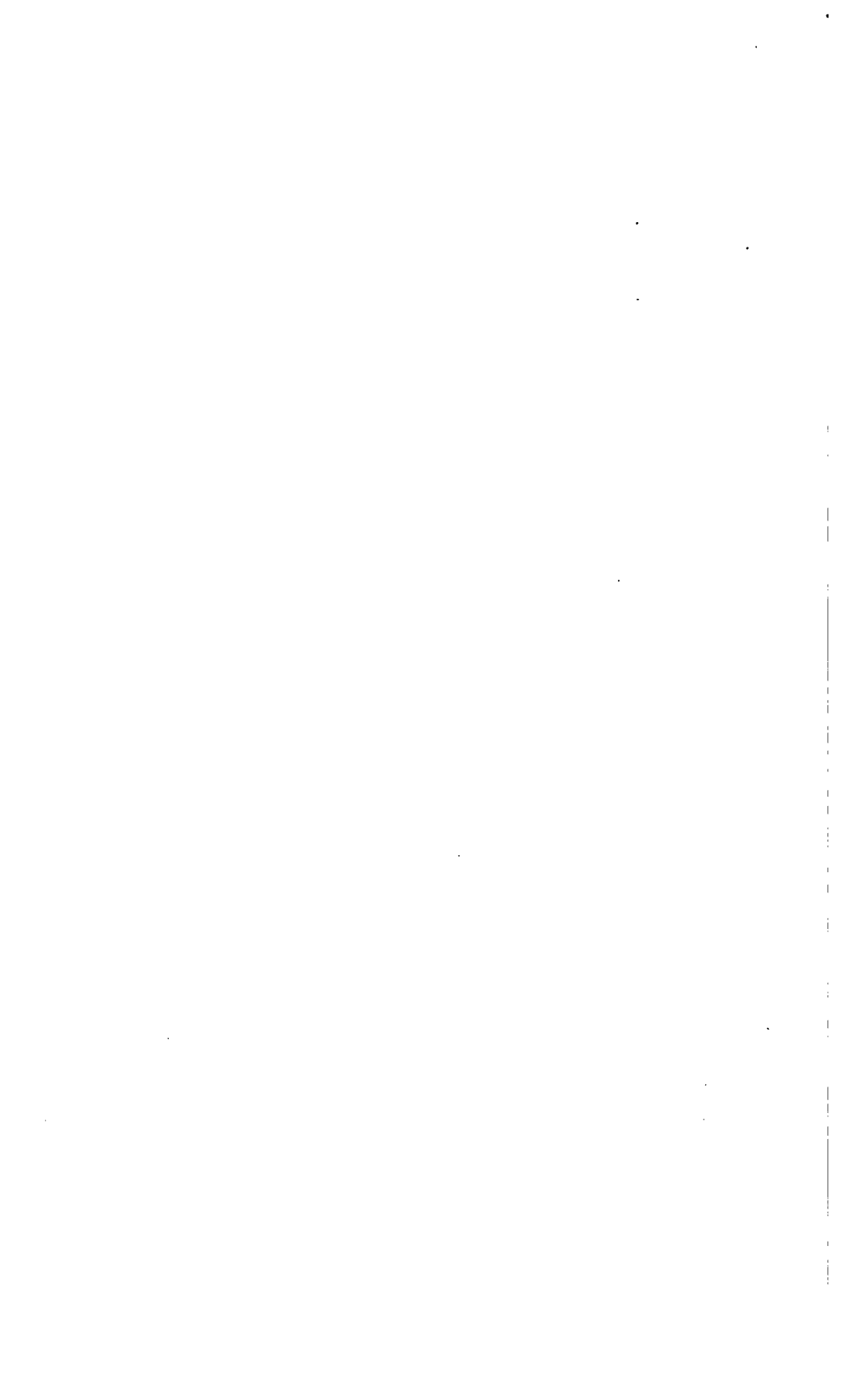


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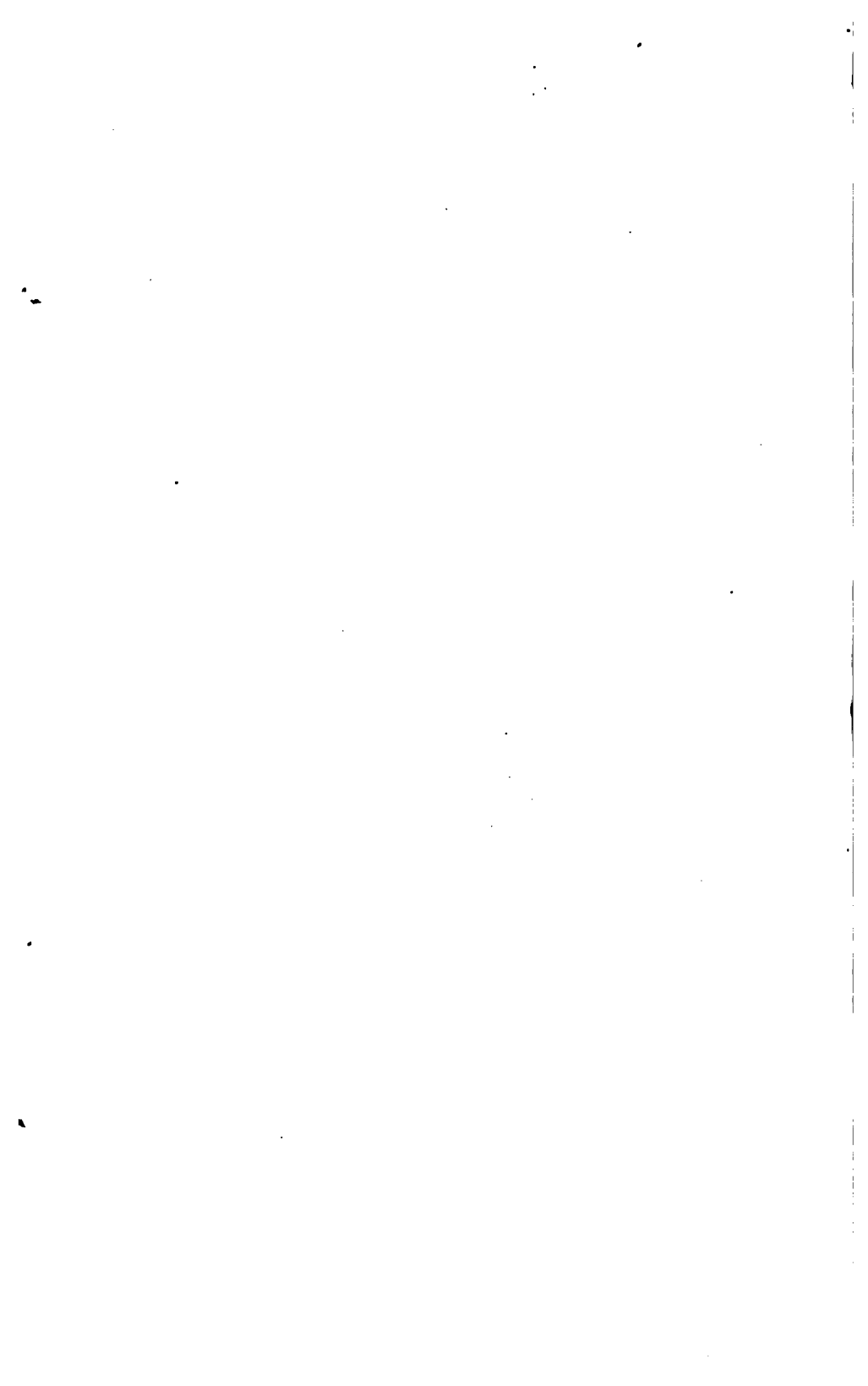
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OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

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NORMAN L. FREEMAN,

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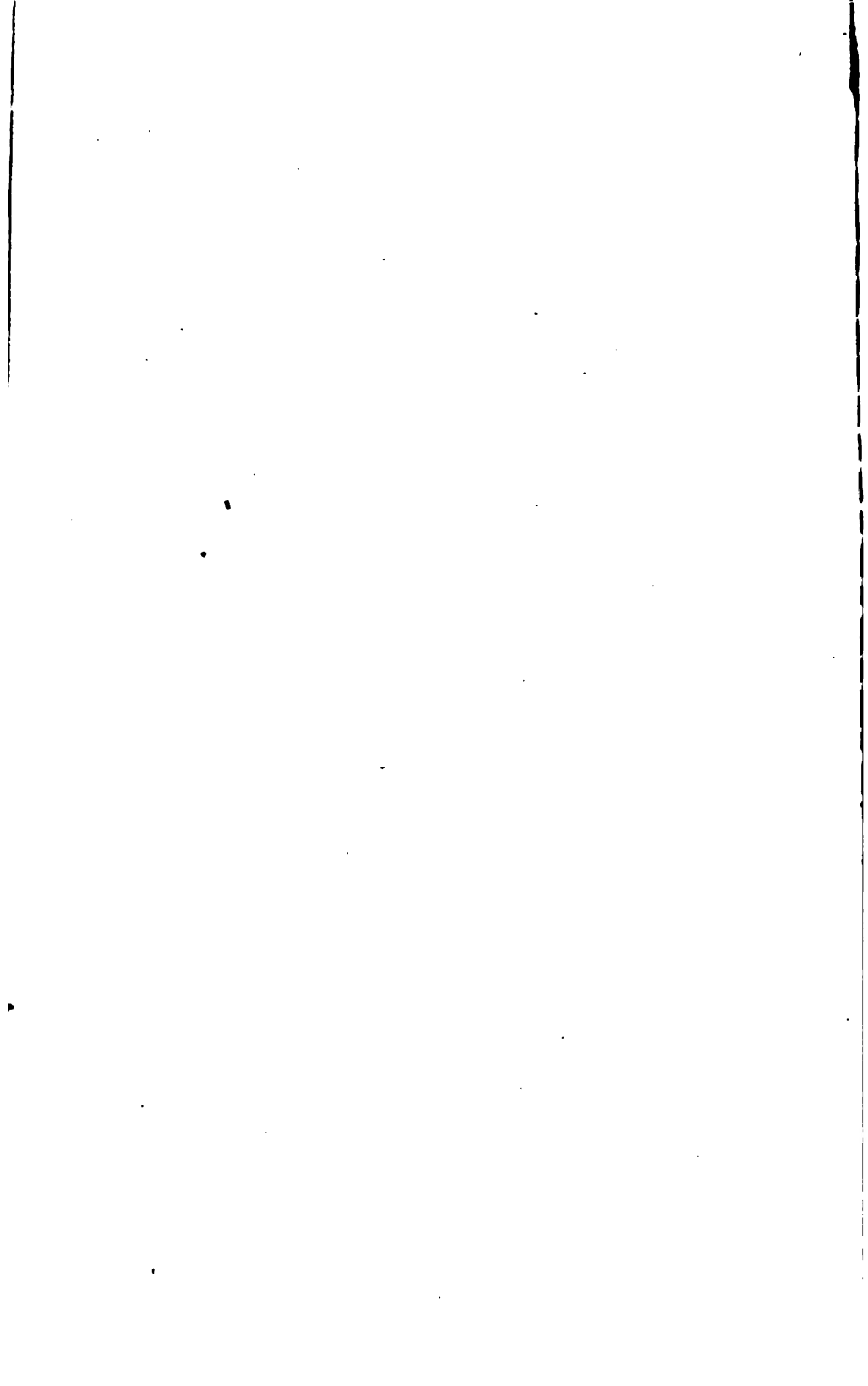
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* In cases of appeals from or writs of error to any of the Appellate Courts, which may be reported in this volume, where the names of the judges of those courts are not given in the report, it will be understood the judges constituting the court in that particular District named were as above stated.



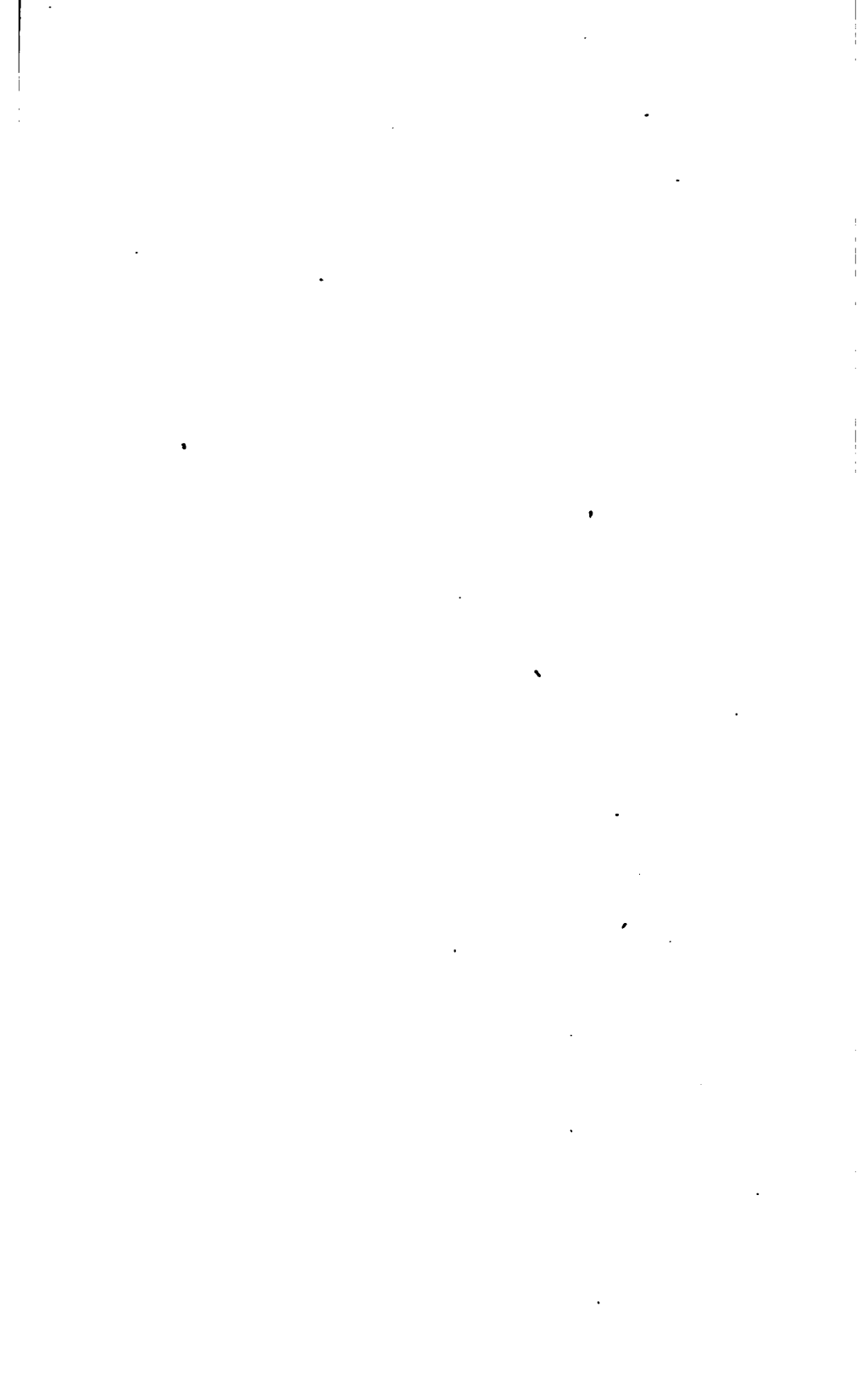
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

GEORGE STRAUCH *et al.*

v.

EDWIN HATHAWAY *et al.*

Filed at Ottawa November 10, 1881.

1. **ACKNOWLEDGMENT**—*evidence to impeach.* In the absence of evidence of fraud, conspiracy or overreaching of any kind, or anything casting a suspicion upon the integrity or honesty of the certifying officer, and when the certificate of acknowledgment of a deed is in conformity with the statute, it can not be impeached by merely negating the facts therein stated.

2. As between the former owner of land and an innocent purchaser under a deed of trust, before the title of the latter can be defeated by impeaching the truthfulness of the certificate of acknowledgment to the trust deed, the evidence must be clear and conclusive, excluding every reasonable doubt.

APPEAL from the Circuit Court of Carroll county; the Hon. JOHN V. EUSTACE, Judge, presiding.

Messrs. HUNTER & HOFFMAN, for the appellants:

The law makes the certificate of acknowledgment of a deed evidence of the execution of the deed. It imports verity, and can not be overcome except by clear and undoubted evidence of its fraudulent character. *Spurgin v. Traub et al.*

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62a	645
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Brief for the Appellees.

65 Ill. 179; *Sisters of Loretto v. Catholic Bishop*, 86 id. 171; *McPherson v. Sanborn et al.* 88 id. 150; *Tunison v. Chamberlin et al.* 88 id. 378; *Myers v. Parks*, 95 id. 408.

After the lapse of several years, proof on the part of a wife will not be allowed to avoid such deed as against an innocent purchaser without notice, by showing that she never in fact acknowledged the deed. *Kerr v. Russell*, 69 Ill. 666; *Choteau v. Jones*, 11 id. 800; *Peck v. Archart*, 95 id. 113; *Hunter v. Stoneburner*, 92 id. 75; *Pratt v. Stone*, 80 id. 440.

MR. JAMES SHAW, for the appellees:

1. The husband alone can not waive the homestead. The wife must join with him to make his waiver effective; and where possession is retained, the homestead can only be alienated when the wife not only signs the conveyance, but also properly acknowledges it. Rev. Stat. 1874, p. 497, sec. 4; *Richards et ux. v. Greene*, 73 Ill. 54; *Moore v. Titman*, 33 id. 358; *Eldridge v. Pierce et al.* 90 id. 474; *Black v. Lush*, 69 id. 70; *Marshall v. Poor*, 35 id. 106.

2. The husband and wife may join in suit to assert the right of homestead. *Eyster v. Hathaway et al.* 50 Ill. 521.

3. A false certificate is a fraud on the wife. A certificate may be impeached like a record, or a fine and recovery. They always could be impeached for fraud. 73 Ill. 337.

4. The homestead right may be asserted at any time, when it has not been abandoned, or conveyed according to statute. *Wing v. Cropper*, 35 Ill. 256; *Young v. Graff*, 28 id. 20; *Allen v. Hawley*, 66 id. 164; *West v. Krebaum*, 88 id. 263; *Asher v. Mitchell*, 92 id. 480; *Moore v. Dixon*, 35 id. 208.

5. The certificate of acknowledgment may be shown to be false. A clear preponderance of testimony will be sufficient in showing this. *Marston et al. v. Brittenham*, 76 Ill. 611; *Lowell v. Wren*, 80 id. 238; *McPherson v. Sanborn et al.* 88

Opinion of the Court.

id. 150; *Blackman v. Hawks*, 89 id. 512; *Myers v. Parks*, 95 id. 408.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

On the 26th of February, 1876, Edwin Hathaway borrowed of Caroline Marks \$3000, to secure which he and his wife, Flora A. Hathaway, executed a deed of trust to Henry A. Miles, as trustee, in the usual form, upon their homestead premises, which the proofs show do not exceed in value \$1000. Default having been made in payment, the premises were sold under the trust deed, and George Strauch became the purchaser. Hathaway and wife having refused, after demand, to surrender possession of the premises to Strauch, the latter instituted an action of forcible detainer to recover their possession, whereupon appellees filed the present bill against appellants in the Carroll county circuit court, by which they seek to set aside the sale under the trust deed, to enjoin the forcible detainer proceeding, and to have their homestead set off and assigned to them. The relief sought by the bill is asked on the alleged ground the deed of trust contained no waiver of the homestead by Mrs. Hathaway. The circuit court found the equities with appellees, and rendered a decree in conformity with the prayer of the bill, and appellants bring the record here for review.

It is admitted that the deed of trust was signed by the wife as well as the husband, and the certificate of the magistrate is in due form, and shows a release and waiver of the homestead by them both. All the witnesses who claim to know anything about the transaction, testify to the fact that Mrs. Hathaway went with her husband to the premises of the justice at the time the acknowledgment was taken, and it is admitted that he acknowledged it; but it is claimed that the husband alone went into the house where the justice kept his office, leaving his wife in the carriage which had conveyed them there, in company with Mr. and Mrs. Holt, all

Opinion of the Court.

four of whom testify to this fact. On the other hand, as has already been stated, the certificate of the magistrate shows a release and waiver of the homestead by them both. The magistrate also testifies to the taking of her acknowledgment at the same time he took the husband's, and that the same was taken at his office, in his house. In addition to this, Mrs. Bell, who was present at the time spoken of by the other witnesses, testifies that Mrs. Hathaway was in the office of the justice at the time of the acknowledgment of the deed by her husband, though she does not pretend to remember the details of what occurred while there.

In view of the fact that more than four years elapsed between the taking of the testimony and the occurrences to which it relates, it is not at all surprising that there should be discrepancies in the recollection of witnesses as to what actually did occur,—that these differences in the recollection of persons of unquestioned integrity, with respect to events which have transpired a number of years past, is but a part of the common experience of every one who notes the current events of life. This being so, it shows how much more reliable and trustworthy, as a muniment of title, is the solemn official record of a fact, made at the time of its occurrence, than the mere recollection of witnesses, however honest, with respect to such fact, especially where years have passed since it transpired.

In the present case, no apparent motive is shown for the execution of a false certificate, and there is nothing in the whole record tending to show any combination, fraud, or conspiracy on the part of the justice or others connected with the transaction. Under such circumstances, nothing but the most clear and satisfactory evidence would warrant us in declaring the certificate of the justice a forgery, and thereby defeating the title of the purchaser at the trustee's sale, who in good faith paid his money for the premises, relying upon the genuineness and truthfulness of the certificate. If landed

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titles could be set aside and defeated upon a mere conflict of verbal testimony, like that presented in the present case, without any evidence tending to establish fraud or conspiracy, no one could know, with any degree of assurance, when he would be safe in buying a title of any kind, and the general confidence in titles of record would soon be destroyed.

Mr. Wharton, in discussing this subject in his work upon Evidence, says: "The true view is, that the certificate of acknowledgment is *prima facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal between the parties by proof of gross concurrent mistake or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the officer to certify, if he has jurisdiction." 2 Wharton on Evidence, sec. 1052.

This court has not gone to the full extent of the latter proposition. While we hold the certificate shall not be deemed conclusive in any case so as to cut off all inquiry, yet where there is no evidence of fraud, conspiracy or overreaching of any kind, or anything casting a suspicion upon the integrity or honesty of the certifying officer, and the certificate of acknowledgment is in conformity with the statute, it can not be impeached by merely negating the facts therein stated. *Monroe v. Poorman et al.* 62 Ill. 523; *McPherson v. Sanborn et al.* 88 id. 150; *Russell v. Baptist Theological Union*, 73 id. 337.

Where the controversy is between the former owner and an innocent purchaser, as in the present case, before the title of the latter can be thus impeached the evidence should be clear and conclusive, excluding every reasonable doubt. The evidence in this case is not of that character. The utmost that can be claimed, even leaving the certificate itself out of the question, is that there is simply a preponderance of testimony in favor of appellees, in so far as numbers of witnesses go to make up preponderance, which is not always a

Syllabus.

safeguard in determining the weight of evidence. But, under the circumstances of this case, we regard the certificate of the officer as entitled to more weight than all the witnesses put together.

The decree of the circuit court will be reversed, and the bill dismissed.

Decree reversed.

CHARLES ALDRICH *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa November 10, 1881.

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1. CRIMINAL LAW—*receiving stolen goods and concealing same for gain, etc.—proof necessary.* In order to convict, under sec. 239 of the Criminal Code, for receiving and aiding in concealing stolen goods for gain, or to prevent the owner from recovering the same, etc., it is essential, first, to show that the property alleged to have been received or concealed was in fact stolen; secondly, that the accused received the goods knowing them to have been stolen, guilty knowledge being an essential ingredient of the crime; and lastly, that the accused, for his own gain, or to prevent the owner from recovering the same, bought, received, or aided in concealing the stolen goods.

2. Where the owner authorizes or licenses another to receive stolen goods, and such other person receives the goods from the thief knowing them to have been stolen, with a felonious intent, he will be guilty of a felony in receiving the property, notwithstanding the license.

3. SAME—*receiving stolen property—must be with criminal intent.* Where a defendant, on behalf of the owner, receives stolen goods from the thief, for the honest purpose of restoring them to the owner without fee or reward, or the expectation of any pecuniary compensation, and in fact immediately after obtaining their possession restores all he receives to the owner, and is not acting in concert or connection with the party stealing to make a profit out of the transaction, he will not be guilty, under the statute.

WRIT OF ERROR to the Criminal Court of Cook county; the HON. ELLIOTT ANTHONY, Judge, presiding.

Brief for the Plaintiffs in Error.

Mr. JOHN LYLE KING, for the plaintiffs in error, after stating and reviewing the evidence in detail, and in its various bearings upon the question of guilt, among various points made the following:

1. The statute makes the receiving of stolen goods by a party for his own gain, or to prevent the owner from obtaining their possession, the distinctive and sole criminal element of guilt in receivers of stolen property. Without such guilty intent the crime can not be committed.

2. The restoration of the goods to the owner was the express object of the scheme of Aldrich and Isaacs, and every step taken by them for getting the property was in that direction, and there is no evidence they were at any time seeking their own gain in the transaction.

3. The shortage in the goods restored is not attributable to the plaintiffs in error. Aldrich's sole possession of the property, and his sole personal knowledge of it, were confined to the five or ten minutes interval of its carriage from the cigar store to the Clifton House, and then in unopened packages, and with the belief and ambition of restoring the property intact. The shortage is no doubt attributable to the thieves, who confess to having retained a portion.

4. The fact, also, that \$100 of the money given to Aldrich to procure a restoration of the goods from the burglars, which was not used, was returned to the owner of the goods, shows very clearly that Aldrich did not seek or act for his own gain. If actuated by a criminal motive he would have reported its payment to the burglars.

5. On the very night of the robbery Isaacs held the chance, for his own gain, of preventing the owner from repossessing his property, by buying it himself upon his own terms, if he had so desired.

Brief for the People. Opinion of the Court.

Mr. LUTHER LARLIN MILLS, State's Attorney, for the People, in his printed argument, contended that Isaacs, the pawn-broker, and Aldrich, formerly in the police service, had learned and knew of the robbery, and knew the thieves, and concealed their names until the agent of the owner of the goods advanced money to be paid the thieves for a restoration, and thereby aided in the concealment of the goods until the thieves were paid for them, and were guilty, under the statute.

That the fact of an agency for the owner existed, does not exonerate the plaintiffs in error where they aided in concealing the goods for their own gain, or to prevent the owner from recovering the same until he paid money therefor, counsel cited 1 Wharton's Crim. Law, sec. 896, *et seq.*, and *People v. Wiley*, 3 Hill, 194.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court :

This was an indictment in the Criminal Court of Cook county, against Charles Aldrich and Emanuel Isaacs, for larceny. In two of the counts it was charged, in the indictment, that for their own gain, and to prevent the owners from again possessing their property, the defendants did buy, receive and aid in concealing the goods of certain named persons, lately before feloniously stolen, the defendants well knowing they were stolen. The jury before whom the cause was tried returned a verdict of guilty of receiving stolen property, and found the property to be of the value of \$6000. The court overruled a motion for a new trial, and rendered judgment on the verdict, and the defendants sued out this writ of error.

In order to obtain a clear understanding of the questions presented by the record, a brief statement of the facts seems necessary. On Friday night, November 26, 1880, four persons, Mike Bauer, Nick Bauer, Herman Schroeder and Mathew Ash, stole a trunk from the Clifton House, in

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Chicago, belonging to J. H. Morrow, which contained jewelry belonging to Eaton & Faas, and Ernest Thoma, of New York, of the value of from \$7000 to \$8000. Morrow had the goods for sale as agent of the owners. On the night the trunk was stolen, one of the thieves, Mike Bauer, told the defendant Isaacs, who was a pawnbroker in Chicago, that he had a quantity of jewelry for sale, and offered to sell to the defendant, but he declined to buy. Bauer desired the defendant to see the goods, which he promised to do at a future day. On the following Sunday, Isaacs, in company with Bauer, went to a room where the latter had the goods concealed, and looked them over, and was offered the property for \$600 or \$700. Isaacs declined to buy, but told him not to be in a hurry, he would talk to him the next day. On Saturday night before this occurred, defendant Aldrich, a policeman, and one Levi, were at Isaacs' place, and the robbery having been mentioned, Isaacs remarked that he could have had the goods for a small sum of money. After obtaining this information from Isaacs, Aldrich and Levi conceived the scheme to recover the property and return it to the owners through Isaacs. On Monday a meeting was had between Aldrich and Morrow, at the Union National Bank, in the presence of Pinkerton, where Aldrich was employed as special policeman, which resulted in an arrangement that Aldrich should obtain the goods belonging to Thoma for \$700, or less if he could, without disclosing the name of the person with whom he should deal, and without reward to himself, save only the reputation which he anticipated would follow the transaction, as a detective of stolen property. On the following Wednesday Morrow paid over to Aldrich \$700, on the guaranty of the vice-president of the Union National Bank that the goods or money should be returned. On the same day Aldrich paid over to Levi \$600 of the money, to be paid to the party who had the goods, through Isaacs, who alone knew such party. Out of the money thus received by Levi he paid over \$450

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to Isaacs. The \$450 Isaacs paid to Bauer, who had the goods, as he testified; but Bauer says he only received of Isaacs \$300. However that may be, upon the payment of the money to Bauer, on Wednesday evening, he took the goods, and, in company with Isaacs, carried them to a cigar store and barber shop on State street. Then Isaacs notified Levi where the goods could be found, and he notified Aldrich, who went to the place designated, found the goods, and within ten minutes carried them in unopened packages, precisely as he had found them, to the Clifton Hotel, and delivered them to Morrow. Bauer represented to Isaacs that the packages returned contained all the goods which had been stolen, those belonging to Eaton & Faas, and also those belonging to Thoma, and Isaacs and Aldrich both understood this to be the case, but upon a subsequent examination it is claimed there was a shortage of some \$1300.

These are, in brief, the substantial facts, as we understand the testimony.

In the argument a number of questions have been presented in regard to the admission and exclusion of evidence, but we have concluded to base our decision on the merits of the case, and hence it will not be necessary to notice these questions.

The indictment in this case was found, and the conviction had, under section 239, chap. 38, of the Criminal Code, Rev. Stat. 1874, p. 388, which declares: "Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned in the penitentiary," etc. On an indictment under this section of the statute for receiving stolen goods, the first thing to be proven is, that the property alleged to have been received was stolen. In this case, however, there is no controversy over that question. It is conceded that the goods in question

Opinion of the Court.

were stolen. Indeed, several of the thieves who stole the property were introduced as witnesses, and testified to the larceny of the goods. After the larceny has been proven it becomes necessary to establish the fact that those accused of the crime received the stolen goods knowing them to have been stolen. Guilty knowledge on the part of the defendant is essential to the constitution of the offence. Wharton, vol. 2, sec. 1889.

The intent, as in larceny, is the chief ingredient of the offence. Thus, where A authorizes or licenses B to receive property lost or stolen, and B receives the property from the thief knowing it to be stolen, with a felonious intent, he is guilty of a felony in receiving the property, notwithstanding the license. Wharton, sec. 1891.

Under our statute there is another essential fact to be proven,—that is, that the defendant, for his own gain, or to prevent the owner from again possessing his property, bought, received or aided in concealing stolen goods. There is no doubt, from the evidence in this case, in regard to the fact that the defendants knew the goods were stolen. Their knowledge is a conceded fact. It is also an undisputed fact that the stolen goods, in passing from the custody of the thieves to Morrow, the agent of the owners, passed through the hands, first, of defendant Isaacs, and, second, through the hands of defendant Aldrich. The question in the case is then narrowed down to this: Whether defendants received the goods for their own gain, or to prevent the owner from again possessing his property. This, in our judgment, is the turning point upon which the decision of the case must hinge. In the disposition of the question we will consider the case, first, as to the defendant Aldrich, and second, as to the defendant Isaacs, as the facts relating to each defendant are somewhat different.

It is not claimed that Aldrich undertook to secure the return of the goods for any fee or reward whatever, or that

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he expected to make any money out of the transaction. On the contrary, it was proven by the prosecution that all he wanted was the reputation of recovering the goods. Upon this point Morrow testified: "Prior to the time the goods were returned, Aldrich said he didn't expect to make a cent out of the transaction; said this on Monday; he never asked for any compensation, or made offer, bargain or proposition for compensation; he said all he wanted was the glory of beating the other fellows in getting the goods." The city authorities and Pinkerton were after the goods. He never asked a dollar. It is true he retained in his possession \$100 of the money which Morrow gave to him, but this was not kept for his own benefit, but for the benefit of Morrow. Upon this point the same witness testified: "On Wednesday night he said he had got all the goods, instead of a part, and that he had saved me \$100." How could he save for Morrow \$100 if the money was retained for his services? This could not be the case, as he had paid over to Levi all he received of Morrow, except this \$100.

It is apparent, from the evidence, that no agreement was ever made under which Aldrich was paid anything for his services,—that he expected nothing and received nothing for the services he rendered in securing the return of the goods. How can it then be said that he received the goods for his own gain? Nor did he receive the goods to prevent the owner from again possessing his property, but, on the other hand, he received them for the very purpose of restoring them to the owner, which he did within ten minutes from the time they came into his possession.

We will now consider the testimony as to the defendant Isaacs. He was a pawnbroker, and on the night the goods were stolen he was approached by one of the thieves, and requested to buy the goods. This he refused to do, but having obtained information as to the custody of the goods, he undertook, afterwards, to assist Aldrich in the consummation

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of his scheme to obtain the goods and restore them to the owner. There was no contract or agreement under which he was to receive any pay for what he might do in the premises. All that he did was done as a favor to help Aldrich, who wanted the credit of getting the goods returned. Levi, who held \$600 to be paid for the return of the goods, handed Isaacs \$450, and retained the balance until it could be ascertained that all the goods were returned. This sum Isaacs testified he paid over to Bauer, but Bauer swears that Isaacs only paid him \$300, promising to pay the balance the next day. This is the only evidence contained in the record tending to show money in the hands of Isaacs as compensation for what he did in the transaction. We do not regard the evidence sufficient. Conceding that the credibility of the two men is equal, which is quite as favorable a view on the side of the prosecution as they could ask, it would leave the matter standing one oath against another, which, under the circumstances of this case, could not be regarded as establishing the fact beyond a reasonable doubt.

Again, if Isaacs had been endeavoring to make money out of the transaction, it is strange he did not avail of the opportunity to buy all the goods for the \$600 for himself, and say nothing to the detectives in regard to the matter. This would have been the course he doubtless would have adopted had he undertaken to get the goods for his own gain. The fact that he did not take this course is a circumstance tending to corroborate his evidence that all he did was without pay or reward. If, then, Isaacs received no compensation, and had no arrangement under which he was to be paid for what he might do, we perceive no ground upon which it can be determined that he received the goods for his own gain, or that he received them to prevent the owner from again possessing his property, within the meaning of the statute.

It may, however, be said, that as the goods passed through defendants' hands they should be held liable for the shortage

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of \$1300, and in this way they received the goods for their own gain. If they retained the goods that were missing there might be force in the position, but from the evidence that was impossible. Isaacs only saw the property on two occasions: first on Sunday, when he looked it over in the presence of Bauer, who does not pretend that Isaacs offered to take any part of the goods; again on Wednesday evening, when the goods were carried by Bauer from Fourth avenue, in packages, to the cigar store. While Isaacs was in company with Bauer, at the time, it does not appear that he in any manner handled the goods. As to Aldrich, his only possession of the property was during the ten minutes which it took him to carry the goods from the cigar store to the hotel, when the property was in packages, and unopened. We can see no ground upon which it can, from the evidence, be claimed that either of the defendants can be held liable for the shortage in the goods. The more reasonable view is, that the missing articles were taken by the thieves and appropriated to their own use while they had the goods in possession.

It is, however, urged, that the fact that the property could have been returned soon after the larceny for \$500, and the fact that Aldrich, in his first interview with Morrow, in substance said it would require \$1400 to obtain the property, the long pendency of the negotiations as to the amount to be paid, and the fact that \$200 more was paid to Aldrich than was demanded by the thieves, are facts which prove the motive of gain. As we understand the evidence, the defendants could not at any time have obtained possession of the property so it could be returned, without paying the thieves the amount of money demanded by them. The defendants can not, therefore, be blamed for the delay, as they acted as soon as Morrow furnished the money to be paid to the thieves. It is true, Aldrich, in his first interview with Morrow, expressed the opinion that \$1400 would be required to obtain the property,

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and this may be regarded as a circumstance against him ; but his subsequent conduct, agreeing to obtain the property for one-half that sum, or as much less as he could, clearly repels the inference that he was seeking to make any gain out of the transaction. It has been suggested that Levi was a myth—that no such person ever lived. The fact that he was never seen or heard of after the night the goods were returned looks somewhat suspicious, but we must be controlled by the evidence in the record, and unless Isaacs, Aldrich, and also the father of Aldrich, are guilty of willful perjury, then Levi was no myth, but was in Chicago at the time of this occurrence, and participated therein, as testified by the defendants.

We have given the evidence in the record a careful consideration, and the only conclusion we have been able to reach is, that it has not been established that the defendants were receivers of the goods for their own gain, or to prevent the owners from again possessing their property. On the other hand, the only logical conclusion that can reasonably be reached from the evidence is, that defendants undertook, on behalf of the owners, to obtain a return of the goods without compensation or reward, and that all of the goods which came into their possession were in good faith returned to the owners. If it had been proven in this case that the defendants had entered into negotiations with Morrow to secure a return of the stolen goods in pursuance of a prior arrangement or understanding with the persons who had stolen the property, with the intent or purpose of making a profit out of the transaction, we would not hesitate to hold that they were guilty, under the statute. A party can not shield himself behind a supposed agency, growing out of an agreement made with the owner of stolen goods for their return, where it appears he is acting in conjunction with the thieves to make a gain or profit out of the transaction. But where the defendants are not actuated by the motive of gain, as they were not in this

Syllabus. Brief for the Plaintiff in Error.

case, and do not aid in secreting the property, we do not understand that a conviction can be had.

The judgment will be reversed and the cause remanded.

Judgment reversed.

MARY ANN KEEGAN

v.

PETER GERAGHTY *et al.*

Filed at Ottawa November 10, 1881.

1. ADOPTED CHILD—*as to his right of inheritance—from whom.* The rights of inheritance acquired by an adopted child under the laws of another State, where he was adopted, will be recognized and upheld in this State only so far as they be not inconsistent with our laws of descent, so that if such child can not take by descent by our statute, it can not take at all, no matter what may be the law of the State where the adoption was made.

2. Under our statute for the adoption of children, an adopted child can take by descent only from the person adopting, and not from the lineal or collateral kindred of the adopting parent. Therefore such child can not, by inheritance, take from a child of the adopting parent born in lawful wedlock, the adopted child not being a brother or sister in fact.

3. SAME—*statute to be strictly construed.* As against an adopted child the statute should be strictly construed, as being in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial.

4. DESCENT—*what laws govern as to real estate.* The laws of this State govern in the descent of real property situated in this State.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. WILLIAM G. McMILLAN, for the plaintiff in error:

That courts will recognize and enforce rights derived under foreign laws, when not in contravention with the laws of their own State, counsel cited Bouvier's Law Dic. title "Comity;"

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148	550
101	26
e184	90
184	93
101	26
187	*435
101	26
e101a	*618
101	26
200	*403
101	26
218	*215

Brief for the Plaintiff in Error.

Roundtree v. Baker, 52 Ill. 241; Story's Conflict of Laws, chap. 8.

The validity of a marriage is governed by the *lex loci contractu*, and by it the *status* of the husband and wife, and the legitimacy of the children, are determined. *McDeed v. McDeed*, 67 Ill. 545; *Clark v. Clark*, 8 Cush. 385; *Phillips v. Gregg*, 10 Watts, 158; *Wall v. Williams*, 11 Ala. 826; *Patterson v. Gaines*, 6 How. 550; *Fourshill v. Murray*, 1 Bland's Ch. 479; *Dumaresby v. Fishly*, 3 A. K. Marshall, 366; *Lacon v. Higgins*, 3 Stark. 178; *Ryan v. Ryan*, 1 Phil. Ecc. 332; *Herbert v. Herbert*, 2 Hagg. Ecc. 263; *Scrimshire v. Scrimshire*, 2 Hagg. Consist. 412; *Midway v. Needham*, 16 Mass. 157; *Dannelli v. Dannelli*, 4 Bush, 51; 1 Bishop's Marriage and Divorce, sec. 355; Story's Conflict of Laws, chap. 5.

That the marriage of the parents after the birth of an illegitimate child in a State or country where the marriage does not legitimize the child, will not make it legitimate, and capable of inheriting in another State or country where such a marriage would have legitimized the child, counsel cited *Shedden v. Patrick*, 1 Macg. 622; 4 Wils. & Sh. App. 89; *Strathmore Peerage case*, 9 Bligh, 51; *Munroe v. Saunders*, 6 id. 468; *Ross v. Ross*, 4 Wils. & Sh. 289; *Dalhousie v. McDonall*, 7 Cl. & Fin. 817; *Munro v. Munro*, id. 842; *Bert-whistle v. Vardill*, 9 Bligh, 32; 2 Cl. & Fin. 571; 7 id. 895; *Scott v. Key*, 11 La. Ann. 232; *Smith v. Kelly's Heirs*, 23 Miss. 167.

As to the effect of the adoption of a child in another State, and the right of such child to take by inheritance, counsel cited *Ross v. Ross*, 129 Mass. 243.

The adoption statute of Illinois was taken from that of Massachusetts, and the construction given to it in the latter State should be adopted here. *Gage v. Smith*, 79 Ill. 219; *Campbell v. Quinlin*, 3 Scam. 238.

Mr. GEO. W. SMITH, also for the plaintiff in error.

Brief for the Defendant in Error Geraghty.

Messrs. CROWLEY & MAXWELL, also for the plaintiff in error :

When Illinois and Wisconsin adopted the Massachusetts statute, they also adopted, to a certain extent, the construction of that statute by the Massachusetts court.

If Michael R. Keegan had died intestate, his estate must have descended in equal shares upon Mary Gertrude Keegan and upon the plaintiff. The rights of the latter are the same as if she had been adopted under the laws of the State of Illinois. Illinois Stat. of Descents ; *Ross v. Ross*, 129 Mass. 243.

The plain, natural meaning of the statute of adoption is, that the adopted child becomes entitled to all the rights of a lawfully begotten child, not only as between herself and her adopting parents, but also as between herself and her parents' lineal descendants, from whom she will take directly, and not by right of representation.

Reference must be had to the statutes of legitimacy, of half blood, the alien laws, and to the statute of adoption, for the correct definition of the word "sister," or the words "descendants of such parents," in the Statute of Descents. *Ross v. Ross*, 129 Mass. 266 ; *Rowley v. Strong*, 32 Mich. 70. See, also, *Sewell v. Roberts*, 115 Mass. 262.

Under a Massachusetts statute, which provides that a child, or the issue of a deceased child, unintentionally omitted in the will of the father or grandfather, shall take the same share as though the father died intestate, it seems that an adopted child has all the rights of lawful issue. *Bowdlear v. Bowdlear*, 112 Mass. 184. See, also, *Loring v. Thorndike*, 5 Allen, 263.

MR. ROBERT HERVEY, for defendant in error Peter Geraghty :

The doctrine of comity is not carried so far as to conflict with and abrogate the positive laws of another State.

The legislature of the State of Wisconsin can not confer any right of inheritance by the person adopted under its enact-

Brief for the Defendant in Error Geraghty.

ments, to property in the State of Illinois, even if this State had no law on the subject of adoption.

But there is a law of adoption in this State, by which the rights of adopted children are defined and settled. Such being the case, claimants to property in this State (as adopted children) must bring themselves within, and are necessarily in all things bound by, its provisions.

The legislature of this State has exercised its sovereign right in providing for the descent of property. Can a foreign State legislature legislate for the mode of descent of property in this State at all, under any circumstances? The plaintiff has no such *status* under the Wisconsin proceeding as will give her a right to inherit property in this State in direct opposition to our State laws.

The cases cited in relation to marriage and the *status* of married persons have no analogy to the case at bar. The marriage relation is *sui generis*, and is not the creature of any statute, while the adoption of children is purely a creature of the statute, no such thing being known to the common law.

The case of *Ross v. Ross*, 129 Mass. 243, is relied on by the plaintiff, but that case is different from this, where the father left no estate to distribute. The Massachusetts courts could not have held that an adopted child could inherit from a devisee, as a sister, for two reasons:

1. Because she is not a sister, which in law means a sister of the whole or half blood. See *Schafer v. Euen*, 54 Pa. St. 304; *Commonwealth v. Nancrede*, 8 Casey, 389; Bouvier's Law Dic. title, "Sister."

2. Because the adopting parent had left no property for the law to distribute, but had devised the whole to the child of his body, and the statute of Massachusetts, like ours, prohibits inheritance by adopted children collaterally.

In *Barnhizel v. Ferrell*, 47 Ind. 325, the court say: "Our statute contains no provision on the subject of the rights of

Brief for the Defendants in Error.

the lawful and adopted children as between themselves." The plaintiff if she could inherit at all, must be by representation, which the statute prohibits.

Mr. WM. W. FARWELL, also for the defendants in error :

1. Mary G. Keegan being a resident of this State when she died intestate, our statute of descent must control as to the descent of her property.

2. Adopted children are not recognized by the common law as children of the adopting parent.

3. The new rights acquired and the new obligations assumed by reason of such adoption, will not be recognized or enforced in any other State, except so far as they are consistent with its own laws and policy.

4. The word "child" and the word "sister," as used in our statute of descents, are to be taken to mean what they ordinarily mean under our laws and according to our language.

5. No new meaning is given to the word child or sister by reason of the statute of adoption. A child adopted under the statute is allowed to claim as a child, by reason of the provisions in that statute, which has been taken into account in applying the statute of descent. The language of the statute of descent is general, while the statute of adoption contains a provision which amounts to a special exception in certain cases. The latter must control as to all cases specially excepted, but the general act must be given effect in all other cases. *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Town of Ottawa v. Town of LaSalle*, 12 id. 339; *Potter's Dwarries on Statutes*, 273.

6. The Illinois statute of adoption does not give the adopted child any right to inherit from the kindred of the adoptive parent.

Opinion of the Court.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

Michael R. Keegan, and his wife, Margaret, resided many years in Columbia county, Wisconsin. They had no children, but in 1862 adopted Mary Ann Keenan, the plaintiff in error, as their daughter, pursuant to the provisions of chap. 49, of the Revised Statutes of Wisconsin of 1858. In 1869, Keegan and his wife removed from Wisconsin to Chicago, in this State, and about this time Mary Ann, being then of lawful age, went to Boston, Mass., where she has ever since resided. Margaret Keegan died in 1874, and Michael R. Keegan not long afterwards married Bedelia M. Geraghty, daughter of Peter Geraghty, one of defendants in error. As the issue of this marriage, Mary Gertrude Keegan was born, in 1875. The mother died in July, 1879. The father, Michael R. Keegan, died in the November following, seized of real estate in this State, leaving his last will, by which he gave all his property to this child, Mary Gertrude Keegan. In December following she died, leaving no brother or sister, and no grandparents except said Peter Geraghty, who was declared by the probate court in Cook county, Illinois, in the adjudication of heirship, to be her next of kin and sole heir at law. Mary Ann, the plaintiff in error, petitioned the probate court to have that order vacated, claiming that by virtue of the adoption proceedings of Wisconsin she became the child of Michael R. Keegan, and consequently was the half-sister of Mary Gertrude Keegan, and as such half-sister is now her sole heir, according to our statute of descent. The probate court found against her. She appealed to the circuit court of Cook county, and that court found against her, from which decision she appealed to the Appellate Court for the First District, which court affirmed the judgment, and she now brings the record here by writ of error.

As Mary Gertrude Keegan was a resident of this State, and died here, intestate, our statute of descent must control as to the descent of her real property situated in this State.

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Under that statute, in order to take, the petitioner must take as the heir at law of Mary Gertrude Keegan, and *as her sister*. She must answer this description of sister.

It is claimed that she is to be regarded in the light of such sister because she is the adopted child of Michael R. Keegan, the father of Mary Gertrude Keegan. The adoption took place in Wisconsin, under a statute of that State, and it is contended on the one side that the statute of Wisconsin has no extra-territorial force; and on the other, that the *status* of child of Michael R. Keegan having been acquired in Wisconsin, such *status*, with the capacity of inheritance belonging to it, is to be recognized and given full effect to in this State.

The case of *Ross v. Ross*, 129 Mass. 243, is referred to as sustaining the latter position. That case raised the question whether a child adopted in Pennsylvania, having a statute of adoption similar to that of Massachusetts, and whose adopting parent afterward removed to Massachusetts, could inherit real estate in Massachusetts upon the adopting parent dying there, intestate. The child was held to be the heir, in an opinion showing great research and consideration. It was there said: "It is a general principle that the *status* or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this *status* and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy."

We are not disposed to question that decision upon the facts of that case, or this general principle so announced, with its limitation that the acquired *status* and rights belonging to it in one State be not inconsistent with the laws and policy of the other State in which they are set up. But we do not admit that the point there decided has any such direct bearing upon the case at bar as should control its decision.

Opinion of the Court.

The facts of the two cases are materially different. In that case the adopted *child* claimed to inherit the property of the *adopting father*. The laws of Pennsylvania, where the adoption took place, gave the child such right of inheritance. The laws of Massachusetts, where the family were afterward domiciled, and where the father died, gave such right of inheritance to a child adopted under the laws of Massachusetts. The decision was, that the adopted child might inherit in Massachusetts from the adoptive father.

The adoption of one person by another is the creation of an artificial relation between people, and is taken from the Roman law, being unknown to the English law. But a majority of the States of the Union have enacted statutes of adoption. There is not uniformity in such statutes. In no two of them, perhaps, are the new rights and obligations precisely the same. Except Louisiana and Texas, Massachusetts seems to have been first of the States to enact a law of adoption. The first statute on the subject in the latter State was passed in 1851, some change in which was made by subsequent statutes there passed in 1860 and 1871. Wisconsin passed the law under which petitioner was adopted, in 1858, it being a re-enactment, substantially, of the Massachusetts law of 1851. Illinois passed her first law on this subject in 1867 (Laws 1867, p. 133,) which remained in force until 1874, when the present law was enacted, which, as to the *rights* of the adopted child, seems to be taken directly from the Massachusetts acts of 1860 and 1871, its wording in such respect appearing to be identical with that of the Massachusetts acts. The Massachusetts act of 1871, and the present Illinois act, as to the *rights* of the adopted child, are substantially the same as the Wisconsin law, except that by the latter there is no exclusion of taking from the lineal or collateral kindred of the parents by right of representation.

The Wisconsin statute, under which petitioner was adopted, is as follows :

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"Sec. 6. A child so adopted as aforesaid, shall be deemed, for the purpose of inheritance and succession by such child, custody of the person and right of obedience by such parent or parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same, to all intents and purposes, as if such child had been born in lawful wedlock of such parent or parents by adoption, saving only that such child shall not be deemed capable of taking property expressly limited to the heirs of the body or bodies of such petitioner or petitioners."

The Illinois statute of 1874 is, as to the rights of the adopted child:

"Sec. 5. A child so adopted shall be deemed, for the purposes of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."

We shall not presume to put a construction upon the statute of Wisconsin, deeming it unnecessary, as, according to the principle laid down in the case of *Ross v. Ross, supra*, as we understand and accept it, the rights of inheritance acquired by the adopted child under the law of Wisconsin will be recognized and upheld in this State only so far as they be not inconsistent with our law of descent, so that if, by our own statute of adoption, the petitioner could not take in this case under our statute of descent, then she can not take, no matter what may be the law of Wisconsin in respect to the rights of an adopted child. Hence, we think we need only address ourselves to the inquiry, whether an adopted child under our statute of adoption could inherit in a case

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such as this, and if we find that she could not, that determines the case against the petitioner.

Our statute of adoption provides that the child adopted shall be deemed, for the purpose of inheritance by such child, the child of the parents by adoption, etc. "For the purpose of inheritance by such child,"—from whom? The statute does not say, but we say, from the adoptive parents. We think it must be so limited from the nature of the proceeding, the propriety of so doing, and from the absence of express words of further extent. The proceeding of adoption is one entirely between such parents and the child, at the instance, by the consent, and upon the petition of the parent or parents. The artificial relation from adoption is established between these parties, and the statute defines what shall be the duties and rights of the parties from this relation between them. As we construe the statute, as between the parties to the transaction the adopted child is deemed, for the purpose of inheritance from the adoptive parents, their child, the same as if he had been born to them in lawful wedlock. And when such an adoptive parent dies intestate, having had no children born to him in wedlock, it is reasonable and just that the property he leaves should go to a stranger to his blood, his adopted child. It would be a consequence of his own desire and request in the taking of the adoption proceeding. But another person, who has never been a party to any adoption proceeding, who has never desired or requested to have such artificial relation established as to himself, why should his property be subjected to such an unnatural course of descent? To have it turned away upon his death from blood relations, where it would be the natural desire to have property go, and pass into the hands of an alien in blood,—to produce such effect, it seems to us, the language of the statute should be most clear and unmistakable, leaving no room for any question whatever. We find in our statute of adoption no express language giving to the adopted child the right to

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inherit from any one else than the adoptive parents. By the statute the adopted child is to be deemed the same as if born in lawful wedlock, for the purpose of inheritance by such child, "and the legal consequences and incidents of the natural relation of parents and children." These last general words, we think, are to be qualified in like manner as the others remarked upon, by restriction to the parties to the adoption proceeding and the persons named in the statute. Surely, in this generality of language there can not be found given the important right to inherit from a person other than the adoptive parents.

The decree of adoption made by the court under section 3 is, that from the date of the decree "the child shall, to all legal intents and purposes, be the child of the petitioner or petitioners," etc. But evidently there was not, under the statute, meant to be given by these general words, nor by those general words "other legal consequences and incidents," etc., in section 5, any rights of inheritance; for section 5 is one making express provision what the rights of inheritance of the adopted child shall be, and section 6 provides what the rights of inheritance of the adopting parents shall be, the sections being devoted solely to those respective subjects. Now, if it had been the intention to give, by the general language above quoted, all rights of inheritance the same as if the adopted child was the child in fact of the adoptive parents, there would have been no need of any further provision upon the subject of inheritance, and the 5th and 6th sections would have been superfluous. But the employment of those sections, providing specifically as to the respective rights of inheritance, shows that it was not the intention to give any rights of inheritance by those general words mentioned.

A point is made upon the change of phraseology in our law of adoption of 1874 from that in the law of 1867. The statute of 1867 was repealed in 1874. That statute of 1867

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was: "It shall be the duty of the court * * * to make an order declaring said child to be the adopted child of such person, and capable of inheriting his or her estate, and also what shall be the name of such child; and thenceforward the relation between such person and the adopted child shall be, as to their legal rights and liabilities, the same as if the relation of parent and child existed between them, except that the adopted father or mother shall never inherit from the child; but to all other persons the adopted child shall stand related as if no such act of adoption had been taken." By the old law the adopted child, as to the adopting parent, was made "capable of inheriting *his or her* estate." The new law says, "for the purposes of inheritance the child shall be deemed as if born in lawful wedlock of the adopting parents." By the old law, as "to all other persons the adopted child shall stand related as if no such act of adoption had taken place." The new law contains no such restriction, and it is said this indicates the intention of the legislature, by the last act, that the adopted child should have the relation to all persons as if born in wedlock of the adopting parents, except in so far as the law itself restricts it. There is force in this suggestion that the dropping out from the present statute of those words of the former statute expressly confining the adopted child's right of inheriting to taking from its adopting parents, and expressly denying that the act of adoption should in any way affect the child's relation to any other persons, indicates a change of the legislative will in the direction of the enlargement of the adopted child's right of inheriting. But when the revision of 1874 was made, there had been no decision, either in Wisconsin or Massachusetts, placing a construction upon their laws on the points we are considering. It is not clear that the revisers or the legislature intended, in changing our statute and adopting section 6 of the Massachusetts act of 1851, as amended there in 1860 and 1871, to make such an important and uncalled for change in

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our law, as now contended for; and it may be, the statute being a new one upon a novel subject in our law, that they made the changes in this case for the sake of uniformity, to bring the statute into conformity with that of Massachusetts on the same subject, thinking that the law remained substantially as before.

It is contended that the last clause of the 5th section of our statute of adoption, by excluding the right of an adopted child to take from the lineal or collateral kindred of the adopting parents, *by right of representation*, impliedly says such child can *directly* inherit, in his own right, from the lineal or collateral kindred of the adopting parents, and that petitioner's claim of inheritance here is, to inherit directly in her own right. We rather deduce the contrary inference from this language,—that it is more in denial than in allowance of inheriting directly from the kindred of the adopting parents. This clause is introduced by way of exception from what had before been granted,—the right of inheritance,—and as by our interpretation the right so given is to inherit from the adopted parents only, the exception is to the right of inheriting from or through the adopting parents—the provision being, in meaning, that the adopted child shall not be deemed so much a child of the adopted parents, that he can, as their representative, inherit from their kindred, lineal or collateral. If, then, as being the adopted child, such child be not permitted to represent and stand in the place of the adoptive parent, and take by representation from the kindred of such parent, it would seem that much more he should not take directly from such kindred.

This whole excepting clause at the close of the 5th section is pointed to inheriting from or through the adoptive parents, the first branch of it being, that the adopted child shall not take property expressly limited to the body or bodies of the parents by adoption; and the second, that he shall not take property from the lineal or collateral kindred of such parents

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by right of representation. The language is all restrictive of inheriting from or through the adoptive parents, and an adopted child being made, "to all legal intents and purposes, the child" of the adopting parent, there would seem to be the more reason that, as representing and standing in the place of the adoptive parent, he should take by right of representation from such parent's kindred, than that he should take directly from such kindred; and any implication there may be from the prohibition to take by right of representation, should rather be against than in favor of the right to take directly. The language in question is all negative, restrictive of the right of inheriting, and it can not be construed as giving any right of inheriting.

Notwithstanding the general words that the adopted child "shall, to all legal intents and purposes, be the child" of the adopting parents, and shall be deemed, as to the "legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock," the right of inheritance from the child, which is given to the adoptive parents by section 6, is very limited, being confined to such property as the child got from the adoptive parents; and there is, besides, an express prohibition against such parents inheriting any property which the child got from his kindred by blood. Mutuality would dictate that if the parents do not inherit from the adopted child's kindred by blood, neither should the child inherit from the adopted parent's kindred. We can not admit this anomalous right, here claimed in a stranger in blood to take by descent in exclusion of kindred, to be given by any doubtful implication or vague generality of language. As against the adopted child the statute should be strictly construed, because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial.

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Another case is referred to by petitioners' counsel as being in support of their claim,—that of *Sewall v. Roberts*, 115 Mass. 262. It holds that an adopted child, as regards a settlement made by the adopting father, by which the remainder was limited to his children, which settlement was made many years before the passage of the act of 1851 of Massachusetts, and before the adoption of the child, must be regarded in the light of a child born in lawful wedlock, and entitled to the remainder. This, like that of *Ross v. Ross*, is the case of a claim by the adopted child to take from the adopting parent, and allowing to the former as against the latter the full rights of a natural child may be reasonable and warrantable under the statute. But the case before us is not a claim by the adopted child to inherit from the adopting parent, but one of the adopted child claiming to inherit from a child of the body of the adopting parent, as her sister; so that authorities upon the right of the adopted child to inherit from the adopting parent do not reach this case, and should not govern the decision of it.

We then find that our statute of adoption contains no provision on the subject of the rights of the children born in wedlock and adopted children, as between themselves,—that no right is given to them to inherit from or through each other. Hence, under our law, the petitioner, for any right to inherit from Mary Gertrude Keegan, the child of the adoptive parent, Michael R. Keegan, must look to our statute of descent; and the right, if any, must be found there alone. To inherit under that statute she must be the sister of Mary Gertrude Keegan. Petitioner is not such sister, nor has she been made an adopted sister, and had given to her the rights of a sister to Mary Gertrude Keegan. An adopted child is not a child in fact, nor is an adopted child, having the rights of a child, a child in fact. But under the statute of descent, to inherit from Mary Gertrude Keegan, as her sister, petitioner

Syllabus. .

must have been the actual child of Michael R. Keegan—being his adopted child will not suffice.

By our own law, then, we find that petitioner can not inherit from the intestate, Mary Gertrude Keegan, and that she could not, if she had been the adopted child of Michael R. Keegan under our own statute of adoption. Even then, if by the adoption proceedings in Wisconsin petitioner did acquire, under the law of that State, such a *status* of child as made her capable to inherit from Mary Gertrude Keegan as her sister, we could not recognize and give effect to such capacity to inherit in this State, as to do so would be in contravention of our own law, and it is our law which must govern in the descent of real property situated in this State.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

EDGAR A. CRANE *et al.*

v.

MONROE N. LORD.

Filed at Ottawa November 10, 1881.

1. RESCISSION—*can not be had after contract has been abrogated, and new one entered into with another.* A sold B a fourth interest in certain real property, receiving part payment, and notes for the balance. Afterwards the conveyance to B was cancelled, and a new one made to B's wife, who gave her notes for the balance due, secured by trust deed to C, which notes A indorsed to C. B becoming dissatisfied, all parties came together, when a new arrangement was made, by which the deed to B's wife was surrendered and her notes given up, and B then took a contract from C for the same premises, giving his notes to him for the sum due on the prior contract. B afterwards filed his bill against A to set aside his original contract as fraudulent, but not making C a party, or seeking to have the contract with him rescinded: *Held*, that by the subsequent arrangement the original contracts with A were abrogated, and there was no contract between A and B to be rescinded.

Briefs of Counsel.

2. CHANCERY JURISDICTION—*remedy at law.* Where a contract for the purchase of land alleged to have been induced by fraudulent and false representations is abrogated by the parties, without any promise to return the purchase money paid, and the purchaser takes a contract for the purchase of the same land for the sum due on the original purchase, from a third person, who is invested with the title, a court of equity has no jurisdiction of a bill by the purchaser seeking to recover back the money paid the original vendor, on the ground of fraud, the remedy being at law, if any.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. J. A. JAMESON, Judge, presiding.

Mr. LEVI SPRAGUE, and Mr. E. A. CRANE, for the appellants, made the following among other points:

Fraud is a matter of chancery jurisdiction, notwithstanding the statute may have conferred a similar jurisdiction upon courts of law. *Babcock v. McCamant*, 53 Ill. 215; *Truett v. Wainwright*, 4 Gilm. 418.

In cases of fraud, chancery has always jurisdiction, though courts of law may exercise it concurrently in all cases in which their powers are sufficient for the relief sought. *Jones v. Neely*, 72 Ill. 449; 1 Story's Eq. Jur. secs. 64, 76, 80.

An agent employed to purchase, can not sell his own property to his principal without disclosing his interest. 1 Story's Eq. Jur. sec. 316; *Penonneau v. Bleakley*, 14 Ill. 15; *White et al. v. Sutherland*, 64 id. 181; *Cottom v. Holliday*, 59 id. 176.

That a purchaser may, for fraud, rescind and recover back the money paid by him, even though it be not possible to restore the parties to their former position, counsel cited *Masson v. Bovet*, 1 Denio, 69; *Hopkins v. Snedeker*, 71 Ill. 449; 2 Parsons on Contracts, 278; *Thomas v. Coultas et ux.* 76 Ill. 493.

Mr. GEO. C. CHRISTIAN, for the appellee, made various points in the case, aside from the question of jurisdiction upon which the case was decided.

Opinion of the Court.

Mr. JUSTICE WALKER delivered the opinion of the Court :

This was a bill, filed in the Superior Court of Cook county, by appellants, asking to have a contract for the purchase of a fourth interest in a tract of land set aside, on the ground of fraud perpetrated by appellee on appellants. Appellant Crane claims he first employed appellee to loan some money for him; that appellee persuaded him to invest it in real estate, as being more profitable; that he knew of a piece that could be purchased at low rates; that it belonged to a person in Europe, who was hard pressed for means, and was compelled to sell, and had placed the title in another person, for the purpose of conveying to purchasers; that appellee professed to be anxious to purchase the property, but claimed to lack the requisite means, but would do so if he could get others to join him; that he proposed to take one-fourth of the title if Crane would take one-fourth, and one Abbott would take the other half; that this was agreed to, but Abbott, on examining the abstract of title, declined to purchase; that it was then agreed that appellee should receive a deed for the entire piece of ground, and would sell to Crane one-fourth interest for \$4100. Appellee received a deed for the tract from Silas C. Stevens.

In October, 1873, appellee gave to Crane an agreement in writing for a conveyance of one-fourth of the tract, which was situated on Indiana avenue, in the city of Chicago, on his paying the \$4100 purchase money. Payments were made on the purchase money, interest and taxes, aggregating, as he claims, \$2329.26. Subsequently a division of the property was made, and appellee made a conveyance of a lot, being Crane's fourth, and notes were taken for the balance of the purchase money. Subsequently this conveyance was cancelled, and a conveyance, bearing date in January, 1876, was made for the property from appellee to Crane's wife, and she and Crane executed two notes of \$500 each, and two of

Opinion of the Court.

\$800 each, drawing ten per cent interest, payable within five years, for the balance of the purchase money; and to secure their payment they gave a trust deed on the property to James Bolton. Appellee indorsed the notes to Bolton. Crane becoming dissatisfied, in June, 1878, notified appellee that he would pay no more on the notes, and tendered him a quit-claim deed for the premises, executed by himself and wife, and demanded the purchase money he had paid, but appellee refused to receive the deed, or to repay the money. Thereupon, Bolton, Crane and appellee came together, when a new arrangement was entered into. By it the deed to Mrs. Crane, which had not been recorded, was surrendered up, and the notes of Crane and wife were surrendered by Bolton and cancelled, and it was agreed that appellee should quit-claim the lot to Bolton, and, on Crane's proposition, a new contract was entered into between him and Bolton. By it Bolton was to release Crane from his personal liability on his and his wife's notes, Bolton to convey to him the lot on Crane's paying him a sum equal to the balance of the purchase money due on the first purchase from appellee, which amounted to \$2820.60, with interest at six per cent, within five years from that date. Crane prepared the agreement for the conveyance, and he and Bolton executed it.

Crane claims that appellee perpetrated a fraud on him in selling him the property, by misrepresenting its value, and its salable quality, etc., and also in false representations as to the ownership of the property, and inducing him to make the purchase under the belief that appellee was a co-purchaser, when he was in fact a part owner, and was but selling the property to Crane. As to fraudulent representations as to the value of the property, etc., we presume that branch of the case was abandoned in the Superior Court, as we find no evidence as to its value, whether less or greater than the contract price. There can therefore be no discussion on that

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question, as the proof must sustain the allegations of the bill, and there is none whatever as to that allegation.

On the question as to the representations as to who owned the property, there is evidence. It appears that John M. Wilson sold to Stevens, Bolton, Flack and appellee, a tract of land embracing the lot in controversy, and as a matter of convenience in making sales they had Wilson to convey it to Stevens, to hold for himself and the other parties. They entered into a written agreement, declaring their several interests, by which it appears that appellee held three-eighths, Stevens one-fourth, Bolton one-fourth, and Flack one-eighth. Thus it appears that it was untrue that the property belonged to a party in Europe, who was compelled from necessity to sell it; but it does appear that appellee did own three-eighths of the title to the land he pretended he was purchasing with Crane.

Notwithstanding all of these facts, was there any subsisting contract between Crane and appellee in reference to this land when this suit was brought? If there was not, then there was none to be rescinded. At the instance of Crane appellee had twice conveyed the land,—once to him, and next to his wife,—in fulfillment of his part of the contract. Next, on these conveyances being cancelled, at his solicitation, appellee conveyed the property to Bolton, and the notes given on the first purchase were surrendered by Bolton, and Crane became the purchaser of him. It is difficult to perceive that this left any contract whatever relating to the land in existence between appellee and Crane. By that arrangement all prior contracts were abrogated and at an end, and the case, stripped of all extraneous circumstances, is but a bill to recover back all of the purchase money paid by Crane to appellee, leaving Crane the purchaser of the lot from Bolton at a much reduced price. Crane seems to be willing, if not anxious, to hold the property, as he does not make Bolton a party, and seek to be absolved from that con-

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tract; but if he can recover the money paid appellee, with interest, as claimed, that will pay all but a fraction of the balance due on the purchase, and he will thus obtain the property by paying but a comparatively small sum more than he agreed to pay when he first purchased. Had appellee, when the last arrangement was entered into, promised to repay what he had received on the purchase, to Crane, would any one have contended that equity could entertain jurisdiction to decree its payment? The remedy in that case would have manifestly been at law. And if, from all the circumstances of the case, the law will imply a promise to repay it, the remedy, for the same reason, must be at law, and equity can not exercise jurisdiction to decree its repayment.

There was therefore no error in dismissing the bill, nor did the Appellate Court err in affirming the decree, and the decree of the latter court must be affirmed.

Decree affirmed.

THE WASHINGTON ICE COMPANY

v.

JOHN G. SHORTALL.

Filed at Ottawa November 10, 1881.

1. **RIPARIAN PROPRIETOR**—*on both sides owns the bed of the stream.* A stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its center thread, unless the grant shows a contrary intention; and the only right the public has therein is an easement for the purpose of navigation. If the same person is the owner on both sides of a river, he owns the whole stream to the extent of the length of his lands upon it. This is the rule of the common law which has been adopted in this State.

2. **SAME**—*rights of riparian proprietor to use of the water.* A riparian owner has rights with respect to water in a running stream, which authorize the actual taking of a reasonable quantity of the water for his own use for domestic, manufacturing and agricultural purposes. The limitation

101	46
120	518
101	46
47a	281
101	46
197	1205
101	46
211	635

Brief for the Appellant.

in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish or impair the right of use of the water by a lower or upper proprietor, as it passes along his land.

3. *SAME—rights of riparian owner to ice on stream over his land.* The just and reasonable use of the water which belongs to the riparian proprietor, in case of its being congealed into ice, would give him the unlimited use and appropriation of the ice as his exclusive property, of which he can not be deprived by a mere wrongdoer. The ice may be regarded as attached to the soil, and, like any other accession, may be considered as a part of the realty, and any stranger who enters upon the same and appropriates the ice to his own use, will be liable to the owner in trespass *quare clausum fregit*.

4. *MEASURE OF DAMAGES—taking and removing ice from stream over the land of another.* Where a person takes the ice in a stream over the land of another, to which the owner of the land has the exclusive right, the measure of damages in trespass for such wrongful taking is the value of the ice as soon as it is made a chattel,—that is, when scraped, plowed, sawed, cut and severed, ready for removal. The rule is analogous to cases where coal is wrongfully taken from the soil of another.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. FRANCIS H. KALES, for the appellant:

1. To take ice from a fresh water river, navigable *de facto*, without the consent of the riparian owner, is not, where there is a right of access, an act of trespass. 3 Kent's Com. *427, 439; *Lyon v. Fishmongers' Co.* L. R. 1 App. Ca. H. L. 683; *Marshall v. Peters*, 12 How. Pr. 218; *Myer v. Whitaker*, 55 id. 376; *State v. Pottmeyer*, 30 Ind. 287; *State v. Pottmeyer*, 33 id. 402; De Jur. Mar. part 1, chap. 3; *Barney v. Keokuk*, 94 U. S. 324.

2. Water in a running stream is not the property of any man. 3 Kent's Com. 427, and cases cited above.

3. That part of the common law which distinguishes salt from fresh water rivers, where both are navigable, has always been quite inapplicable to our condition, and in no sense can it be said to have been adopted as part of our law. *The Daniel Ball*, 10 Wall. 557; *The Montello*, 11 Wall. 411; *Barney v. Keokuk*, 94 U. S. 324; *Chicago v. McGinn*, 51 Ill. 266.

Brief for the Appellee.

4. The mis-survey and plat returned to the government office, showing that a stream is apparently not navigable, when in point of fact it is navigable, will not be allowed as authority for a conveyance to a private party of a river which is actually navigable.

5. If the river be navigable, nothing passes below the low water, and that rule is applied by the Supreme Court of the United States to fresh water rivers navigable *de facto*. *Railroad Co. v. Schurmier*, 7 Wall. 272; *Yates v. Milwaukee*, 10 id. 497; *Barney v. Keokuk*, 94 U. S. 324.

6. Meander lines are not boundary lines. *Railroad Co. v. Schurmier*, *supra*; *Middleton v. Pritchard*, 3 Scam. 522.

7. The court erred in instructing the jury as to the measure of damages. It should have given defendant's instruction, that in no case was the plaintiff entitled to recover more than nominal damages.

Mr. JOSEPH WRIGHT, for the appellee:

By the common law only arms of the sea, and streams where the tide ebbs and flows, are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it, *ad filum aquæ*, and the only right the public has therein is a right of easement for the purpose of navigation. *City of Chicago v. McGinn*, 51 Ill. 266; *Ensminger v. The People ex rel. City of Cairo*, 47 id. 384.

By the common law, which prevails in this State, it is well settled that grants of land bounded on rivers or upon their margins, above tide water, carry to the grantee the exclusive right and title to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river. *Braxton et al. v. Bressler*, 64 Ill. 488; *Canal Trustees v. Havens*, 11 id. 554; *The City of Chicago v. Laflin et al.* 49 id. 172; *The Chicago and Pacific R. R. Co. v. Stein*,

Brief for the Appellee.

75 id. 41; *Middleton v. Pritchard*, 3 Scam. 510; *Houck v. Yates*, 82 Ill. 179.

And when the riparian proprietor has the title to land on both sides of the stream, he is the owner of the whole of the bed thereof, subject to the public right of navigation. Angell on Water Courses, (7th ed.) p. 14, sec. 10; *Olson v. Merrill*, 42 Wis. 203.

The same rule adopted by our courts prevails in other States. *Brown v. Chadbourne*, 31 Maine, 9; *Lorman v. Benson*, 8 Mich. 18; *Adams v. Pease*, 2 Conn. 481; *Stover v. Freeman*, 6 Mass. 439; *Marnier v. Shulte*, 13 Wis. 692; *Claremont v. Carleton*, 2 N. H. 369; *Commissioners v. Withers*, 29 Miss. 29; *Gavit v. Chambers*, 3 Ohio, 495; *The State v. Pottmeyer*, 33 Ind. 402; *Morgan v. Livingston*, 6 Martin, (La.) 216; *Barry v. Snyder*, 3 Bush, (Ky.) 266.

As to the rights of riparian proprietors to the use of the flowing water, to fish therein, etc., counsel cited *Agawam Canal Co. v. Edwards*, 36 Conn. 476; Angell on Water Courses, (7th ed.) 70, 73; *Hart v. Hill*, 1 Whart. 138; *Coolidge v. Williams*, 4 Mass. 140; *Beckman v. Kramer*, 43 Ill. 447.

That a riparian proprietor owns the soil of the stream, subject to the public easement, the same as in the case of an ordinary highway, see *Cook v. Green*, 11 Price, 736; *Sir John Lade v. Shepherd*, 2 Str. 1004; *Stevens v. Whistler*, 11 East, 51; *Makepeace v. Worden*, 1 N. H. 16; *Babcock v. Lamb et al.* 1 Cow. 238.

That such proprietor is entitled to all accretions and alluvions, counsel cited the following authorities: Angell on Water Courses, (7th ed.) 68; *Ingraham v. Wilkinson*, 7 Pick. 268; *Berry v. Snyder*, 3 Bush, 266; *Lovington v. County of St. Clair*, 64 Ill. 56; *Adams v. Frotheringham*, 3 Mass. 363; *Ex parte Jennings*, 6 Cow. 518; *Deerfield v. Arms*, 17 Pick. 41; *Middleton v. Pritchard*, 3 Scam. 510.

The principle governing accretions is applicable to the addition of ice formed over the bed of the stream.

Opinion of the Court.

That ice is a commodity and property, see *State v. Pottmeyer*, 33 Ind. 402; *Myer v. Whittaker*, 55 How. Pr. R. 376; *Mill River Woolen Mill Co. v. Smith*, 34 Conn. 462.

As to the measure of damages, counsel cited *Illinois and St. Louis R. R. and Coal Co. v. Ogle*, 92 Ill. 53; *McLean Coal Co. v. Lennon*, 91 id. 561; *Illinois and St. Louis R. R. and Coal Co. v. Ogle*, 82 Ill. 627; *McLean Coal Co. v. Long*, 81 Ill. 359; *Robertson v. Jones*, 71 Ill. 405.

As to appellee's right to maintain trespass *quare clausum fregit*, the court is referred to *Cox v. Glue*, 5 C. B. 533; *Smith v. Royston*, 8 M. & W. 381; *Wilcox v. Kinzie*, 3 Scam. 218.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of trespass *quare clausum fregit*, brought in the circuit court of Cook county by Shortall, against the Washington Ice Company, for cutting, removing and appropriating, in January and February, 1879, a quantity of ice which had formed over the bed of the Calumet river, within the limits of plaintiff's land, in Cook county. Defendant pleaded the general issue, and *liberum tenementum*. A verdict and judgment were rendered in favor of plaintiff for \$562.40, which judgment, on appeal to the Appellate Court for the First District, was affirmed, and defendant appealed to this court.

On the trial, the patent from the United States to Lafrombois and Decant was introduced in evidence, showing that there was no restriction or reservation by the government, and that the *locus in quo* was embraced in the 125⁸¹/₁₀₀ acres the patent conveyed. Under this patent plaintiff derived title.

From the evidence it appears that the call of 125⁸¹/₁₀₀ acres contained in the patent required that the bed of the river should be included to make that quantity; that the Calumet river, extending from Lake Michigan westward past the plain-

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tiff's premises, where it is between 165 and 200 feet wide, is in fact a navigable river; that the defendant company owned ice-houses on its own property on the next lot east of plaintiff's, and that in operating on the ice it did not go on the plaintiff's land, save as it entered upon the ice; that it first gathered the ice in front of its own land from the river, and then commenced to take the ice opposite the plaintiff's premises.

The court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attaching to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages, in case of a finding for plaintiff, would be the value of the ice as soon as it existed as a chattel—that is, as soon as it had been scraped, plowed, sawed, cut and severed, and ready for removal. Defendant excepted to the giving of such instruction, and asked the court to instruct the jury that a riparian owner on the banks of a river, navigable in fact, has no property in the ice formed in the midst of the stream, where he has done nothing to pond or separate it; but that any person might, as against such riparian owner, where he could gain access without passing over the shore or banks of the owner, enter upon the ice and remove the same, without cause of action or damage to such riparian owner, and that if such access as above stated had been gained, then at most, plaintiff could recover but nominal damages, even if the action of trespass be sustained,—which was refused, and defendant excepted. The giving and refusing of instructions is assigned as error.

It may be well to inquire, first, whether plaintiff, as riparian proprietor on both sides of the Calumet river, is the owner of the bed of the stream within the limits of his land. By the common law, only arms of the sea, and streams where the

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tide ebbs and flows, are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its centre, and the only right the public has therein is an easement for the purpose of navigation. Chancellor Kent, in his *Commentaries*, declares it as settled that grants of land bounded on rivers or upon their margins, above tide water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it. 3 Comm. 427, 428, Marg. And this title to the middle of the stream includes the water, the bed, and all islands. 2 Hilliard on Real Prop. 92; Angell on Water Courses, sec. 5.

This rule of the common law has been adopted in this State, and is here the settled doctrine. It was so held in *Middleton v. Pritchard*, 3 Scam. 510, and *Houck v. Yates*, 82 Ill. 179, with regard to the Mississippi river where it bounds this State; in *Braxon v. Bressler*, 64 Ill. 488, as to Rock river; *City of Chicago v. Laflin*, 49 Ill. 172, and *City of Chicago v. McGinn*, 51 Ill. 266, in regard to the Chicago river.

The Calumet river then being non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

The next question respects the ownership of ice formed over the bed of the river passing through the land. It is objected by defendant that water in a running stream is not the property of any man,—that no proprietor has a property in the water itself, but a simple usufruct while it passes along; but manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

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In *Agawam Canal Co. v. Edwards*, 36 Conn. 497, it is said: "The principle contained in the maxim, '*cujus est solum ejus est usque ad cælum*,' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water,—it is a usufruct merely,—a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its tributaries; and as each has a similar and equal usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below."

In *Elliott v. Fitchburg Railroad Co.* 10 Cush. 191, SHAW, Ch. J., says: "The right to flowing water is now well settled to be a right incident to property in the land,—it is a right *publici juris*, of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet as one of the beneficial gifts of Providence each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it can not be said to be wrongful or injurious to a proprietor lower down. * * * Still, the rule is the same, that each proprietor has a right to the reasonable use of it for his own benefit, for domestic use, and for manufacturing and agricultural purposes."

In *Rex v. Wharton*, 12 Mod. 510, HOLT, Ch. J., says: "If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land."

Hilliard states that a water course is regarded in law as a part of the land over which it flows. 2 Hilliard on Real Prop. 100,

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It will thus be seen that the riparian owner, as such, has rights with respect to water in a running stream,—he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor as it passes along his land. The only opposing rights are such rights of the public, and such upper and lower proprietors. But when the water becomes congealed, and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others. We are of opinion there is such latter right of use, and that it should be held property, of which the riparian owner can not be deprived by a mere wrongdoer. When water has congealed and become attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? And we do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner.

In *McFarlin v. Essex Co.* 10 Cush. 309, SHAW, Ch. J., remarked: "It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the common law sense of the term,—that is, in all waters above the flow of the tide,—the right of fishery is in the owner of

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the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water to the middle or thread of the river."

The riparian proprietor has the sole right, unless he has granted it, to fish with *nets* or *seines* in connection with his own land. Angell on Water Courses, sec. 67.

In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut river above the flowing and ebbing of the tide, have an exclusive right of fishery* opposite to their land, to the middle of the river; and that the public have an easement in the river as a highway, for passing and repassing with every kind of water craft. So, too, sea-weed thrown upon the shore belongs to the owner of the soil upon which it is cast. *Emans v. Turnbull*, 2 Johns. 313.

The exclusive right in the owner to take the ice formed over his land, is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned, and may with like propriety be recognized. It is connected with and in the nature of an accession to the land, being an increment arising from formation over it, and belonging to the land properly, as being included in it in its indefinite extent upwards.

Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it a quite important business. It would not be in the interest of peace and good order, nor consist with legal policy, that such an article should be held a thing of common right, and be left the subject of general scramble, leading to acts of force and violence.

*As to the right of fishery in this State, in riparian proprietors, see *Beckman v. Kreamer*, 43 Ill. 447, and cases there cited.

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In reference to the rule which we here adopt. of assigning to the owner of the bed of a stream property in the ice which forms over it, we may well use, as fitly applying, the language of *Hosmer, J.*, in *Adams v. Pease*, *supra*, in speaking of the common law rule as to the right of fishery, viz: "The doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner."

The views we hold are in accordance with the holding in *The State v. Pottmeyer*, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal. See further, relative to the subject, *Myer v. Whitaker*, 55 How. Pr. Rep. 376; *Lorman v. Benson*, 8 Mich. 18; *Mill River Woolen Manufacturing Co. v. Smith*, 34 Conn. 462; *Brown v. Brown*, 30 N. Y. 519.

Defendant claims that it committed no trespass in taking the ice, because the ice in the midst of a stream navigable in fact, is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner, to enter upon the ice and remove it. We said in *Braxton v. Bressler*, above cited: "Where the river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to remove the rock, gravel or soil, except as necessary to the enjoyment of the easement." The same is to be said as to the ice here. But it was not removed as necessary for the enjoyment of the public easement of navigation,—it was for the purpose only of the appropriation of it for defendant's gain.

As to the instruction as to the measure of damages, we think the case is analogous to those where coal is taken from the soil, and that the instruction is sustained by former decisions of this court in those cases. *Illinois and St. Louis*

Syllabus.

R. R. and Coal Co. v. Ogle, 92 Ill. 353; *McLean County Coal Co. v. Lennon*, 91 id. 561; *Illinois and St. Louis R. R. and Coal Co. v. Ogle*, 82 id. 627; *McLean County Coal Co. v. Long*, 81 id. 359; *Robertson v. Jones*, 71 id. 405.

Perceiving no error in the giving or refusing of instructions by the circuit court, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

JAMES S. JEWELL *et al.*

v.

THE ROCK RIVER PAPER COMPANY *et al.*

Filed at Ottawa November 10, 1881.

1. CORPORATION—*articles of association—evidence that capital stock has been subscribed.* The articles of association of a corporation, certified by the Secretary of State, are *prima facie* evidence of the fact that the full amount of the capital stock required by the articles has been subscribed, and is sufficient proof of that fact until overcome by rebutting evidence.

2. SAME—*subscriber estopped by his fraud from questioning the right to fill up blank as to amount.* If a party signs a subscription book for stock in a contemplated corporation, merely to induce others to subscribe the same, leaving the amount of his own subscription blank, it is but fair to hold that, as to creditors of the company, he thereby impliedly authorizes those empowered to take subscriptions to fill up the blank, and that when done such subscriber will be estopped from questioning their authority to do so.

3. SAME—*fraud in its formation will not affect creditors.* If a new corporation is organized by parties interested in an old one, for the purpose of getting rid of its liabilities and fastening them upon the new company, and the latter, by arrangement with the creditors of the former company, bids off the property of the old company for the amount of its liability, and gives its notes therefor to such creditors, secured by deed of trust, the fraud, if any, on the part of those representing the old company, can not affect the creditors, and these facts will constitute no defence to a suit to compel the stockholders in the new company to pay their unpaid subscriptions to satisfy the liabilities thus assumed by the new company.

101	57
35a	198
101	57
41a	399

101	57
154	473

101	57
161	432
49a	638

101	57
48a	320

101	57
54a	465

101	57
78a	640

101	57
178	540

101	57
85a	384

101	57
182	491

101	57
185	211

87a	608
88a	22

101	57
186	1360

101	57
92a	246

101	57
98a	49

101	57
193	57

101	57
218	419

Brief for the Appellant Jewell.

4. *SAME—creditors not affected by fraudulent arrangements between subscription agent and subscribers.* The creditors of a private corporation organized under the general law of 1872, can not be affected by a mere private understanding between the subscribers and the subscription agent of the company, by which the former are exonerated from the payment of their subscriptions, wholly or in part, contrary to its terms, nor by the fact that many of the subscribers at the time of subscribing were notoriously insolvent; and such facts constitute no defence to the collection of subscriptions from solvent parties for the benefit of creditors of such company.

5. *SAME—inconsistent parol agreement is void.* A parol agreement, made at the time of a written subscription to the capital stock of a private corporation, with some of the subscribers, by the subscription agent, that their subscriptions shall not be collected, or shall be collected only in part, or may be paid in services, being inconsistent with the written contract, is void as to the other subscribers and creditors of the company.

6. *CHANCERY PRACTICE—parties when concluded by master's report.* Where matters of fact are referred to a master, it is the duty of the parties, when notified, to appear before him and there contest the matter, and if his findings are not correct in their judgment, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report, if wrong. If on such hearing the master declines to change his report, the objecting party must file exceptions to it when it is filed. When this course is not pursued, and no sufficient reason is assigned for not doing so, the master's report, when approved by the court, will in this court be deemed conclusive upon the questions covered by it.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. JOHN H. HAMLINE, for the appellant James S. Jewell :

1. The full amount of capital stock demanded by the articles of association of the Chicago Publishing Company was never subscribed, and the company was never legally organized in accordance with the act concerning corporations. *Ullman v. Havana and Rantoul R. R. Co.* 88 Ill. 521; *Pitchford v. Davis*, 5 M. & W. 2; *Bray v. Farwell*, 81 N. Y. 600; *Fox v. Clifton*, 6 Bing. 776; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23; *Cabot and West Springfield Bridge Co. v. Chapin et al.* 6 Cush. 50; *Stoneham Brand R. R. Co. v. Gould*, 2 Gray, 277; *Littleton Manufacturing Co. v. Parker*,

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14 N. H. 543; *Old Town and Lincoln R. R. Co. v. Veazie*, 39 Maine, 571; *Sanford v. Handy*, 25 Wend. 475; Thompson on Liability of Stockholders, sec. 120, and cases cited; *Swartwout v. Michigan Air Line*, 24 Mich. 396; *Mokelumne Hill Manufacturing Co. v. Woodbury*, 14 Cal. 424; *Fire Dept. of New York v. Kilp*, 10 Wend. 266.

2. The appellant is not estopped from showing this. *Cross v. Pinckneyville Mill Co.* 17 Ill. 54; *Slocum v. Providence Steam and Gas Co.* 10 R. I. 113.

3. The case being distinguished from the following cases, for the reason that the acts of appellant have given no ground for estoppel, while in the latter cases the defendant has invariably done some act himself affirming the existence of the corporation. *Rice v. Rock Island and Alton Railroad Co.* 21 Ill. 93; *Tarbell v. Page et al.* 24 id. 46; *Thompson v. Candon*, 60 id. 244; *McCarthy v. Lavasche*, 89 id. 275; *Dows v. Naper*, 91 id. 44; *Chubb v. Upton*, 5 Otto, 666; *Corwith v. Culver*, 79 Ill. 502.

4. The majority of the stock purporting to have been subscribed was fictitious, and hence the capital stock of the Chicago Publishing Company was not fully subscribed, and the company was not legally organized. Angell and Ames on Corporations, (9th ed.) sec. 86; *McConaby v. Centre Turn. Co.* 1 Pa. 426; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

5. Appellants' contract was a conditional one, and the conditions expressed on the face thereof have not been complied with. Thompson on Liability of Stockholders, secs. 116, 117, 118, and cases cited; *Chase v. Sycamore and Courtland R. R. Co.* 38 Ill. 215; *Melvin v. Lamar Ins. Co.* 80 id. 459; *Jersey City Gas Co. v. Dwight*, 24 N. J. Eq. 242; *McConaby v. Centre Turn. Co.* 1 Pa. 426.

6. Appellant not being a member of the corporation, the books were not evidence against him. *Chase v. Sycamore and Courtland R. R. Co.* 38 Ill. 215.

Brief for the Appellants.

Mr. WILLIAM C. WILSON, and Mr. DAVID L. ZOOK, for the other appellants :

1. The entire capital stock of the alleged company was never in fact fully subscribed, and until that was done there could be no organization or transaction of business in the name of the company. *Bray v. Farwell*, N. Y. Court of App. ; *Ullman v. Havana and Rantoul R. R. Co.* 88 Ill. 521.

2. Many of the subscriptions were fraudulent upon the other subscribers. The subscribers were insolvent, and known to be so to appellees. *Angell & Ames on Corporations*, (10th ed.) secs. 88, 517 ; 1 Pa. 426.

3. The corporation had no authority to buy the subscription list, good will, and old debts due to the Post and Mail Printing Company. The notes given for the purchase money were *ultra vires*, and imposed no obligation whatever. *Re Saxon Life Ass. Society*, 2 J. & H. 400 ; on appeal, 1 De G. J. & Sm. 29 ; on rehearing, 1 H. & M. 672 ; *Ernest v. Nicholls*, 6 H. of L. Cases, 401 ; *Ashbury Railroad Carriage Co. v. Riche*, L. R. 7, Eng. and Irish App. 653 ; *East Anglican Ry. Co. v. Eastern Counties Ry. Co.* 11 C. B. 775 ; *Re Empire Assurance Co.* L. R. 8 Ch. 340.

4. At the time of the alleged assumption of said indebtedness no stock was held in said corporation by any of these appellants, nor have they ever held or owned any stock, and no liability can be incurred by them or imposed upon them in the absence of stock. *Baker et al. v. Admrs. of Backus*, 32 Ill. 79 ; *Steele v. Dunne*, 65 id. 298 ; Rev. Stat. 282, sec. 8.

5. Unless a subscriber ratifies with a full knowledge, he is not bound. *Angell & Ames on Corporations*, sec. 517.

6. A false and fraudulent representation by an agent or commissioner, to obtain subscriptions to the stock of the company, will avoid the subscriptions. *Crossman v. Penrose Ferry Bridge Co.* 26 Pa. St. 69.

Brief for the Appellees.

Mr. A. H. LAWRENCE, for the appellees :

The appellants are concluded by the approval of the master's report, as to all the findings of facts by him. The exception by White, after the report was filed, was too late. The report can not be questioned here for the first time. *Reigard v. McNeil*, 38 Ill. 401; *Clark v. Laughlin*, 62 id. 278; *McClay v. Norris et al.* 4 Gilm. 386; *Prince v. Cutler*, 69 id. 267; *Pennell v. Lamar Ins. Co.* 73 id. 303; *Hurd v. Goodrich*, 59 id. 450; *M. E. Church v. Jacques*, 3 Johns. Ch. 77.

It was inadmissible for defendants to show that their subscriptions were in fact qualified and limited by parol conditions. *Corwith v. Culver*, 69 Ill. 506; *Melvin v. Lamar Ins. Co.* 80 id. 456; *Graff v. Pittsburg and Steubenville R. R. Co.* 31 Pa. St. 489; *Robinson v. Pittsburg R. R. Co.* 32 id. 339; *Downie v. White*, 12 Wis. 176; *Mann v. Cook*, 20 Conn. 178; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124; *Johnson v. Crawfordsville R. R. Co.* 11 Ind. 280; *Blodgett v. Merrill*, 20 Vt. 509; *Pickering v. Templeton*, 2 Mo. App. 425; *Thornburgh v. Newcastle R. R. Co.* 14 Ind. 499.

Every subscription to the capital stock of a company is a separate and independent contract. *Price v. Grand Rapids R. R. Co.* 18 Ind. 137; *Conn. and Pass. R. R. Co. v. Bailey*, 24 Vt. 465; *Hatch v. Dana*, 11 Otto, 210.

Having taken part in the proceedings of the company, paid stock assessments, and in various ways recognized the existence of the company, appellants above named are, by such acts on their part, estopped from questioning the legality of the organization of the company, or their liability as stockholders therein. *Thompson on Liability of Stockholders*, secs. 162, 163, 164, 165, 170; *Black River and Utica R. R. Co. v. Clark*, 25 N. Y. 208; *Maltby v. Northwestern Va. R. R. Co.* 16 Md. 422; *Hager v. Cleveland & Bassett*, 36 id. 476; *Frost v. Walker*, 66 Maine, 468; *Dayton and Cin. R. R. Co.*

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v. *Hatch*, 1 Disney, 84; *Corwith v. Culver*, 69 Ill. 506; *Central Plank Road v. Clements*, 16 Mo. 359.

Appellants having suffered the company to hold itself out to the world as a legally created body corporate, they can not, as against creditors, attack the organization of the company. This can not be done in a collateral proceeding. *Angell & Ames on Corporations*, secs. 635, 636; *Swartwout v. Mich. Air Line R. R. Co.* 21 Mich. 389; *Slocum v. Providence Steam Co.* 10 R. I. 112; *Slocum v. Warren*, 10 id. 116; *Tarbell v. Page*, 24 Ill. 46; *Price v. Rock Island and Atchison R. R. Co.* 21 id. 93; *Thompson v. Candor*, 60 id. 244; *McCarthy v. Larasche*, 89 id. 270; *Dows v. Naper*, 91 id. 44; *Chubb v. Upton*, 5 Otto, 665.

This being a suit by creditors against stockholders, to enforce payment of their unpaid stock subscriptions, it is no defence for such stockholders to say they were induced to subscribe by false and fraudulent representations made to them by the company, or by Willard, its agent. *Ogilvie v. Knox Ins. Co.* 22 How. 380; *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 id. 667; *Payson v. Withers*, 5 Biss. 269; *Litchfield Bank v. Church*, 29 Conn. 137; *Clark v. Thomas*, 34 Ohio St. 46; *Ruggles v. Brock*, 6 Hun, 164; *Goodrich v. Reynolds*, 31 Ill. 490.

MESSRS. DUPEE & JUDAH, also for the appellees.

MR. JUSTICE MULKEY delivered the opinion of the Court:

This is an appeal from a judgment of the Appellate Court for the First District affirming a decree of the Superior Court of Cook county, in favor of appellees, as creditors of the Chicago Publishing Company, and against the company and certain of its stockholders, to recover from the latter unpaid subscriptions to its capital stock.

The company was organized under the general Incorporation act of 1872, entitled "An act concerning corporations,"

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in the latter part of the winter of 1878, with O. A. Willard, since deceased, as its president and business manager. The statement filed with the Secretary of State, as required by the second section of the Incorporation act, shows the company was organized for the purpose of doing a general printing business, including the publication of a newspaper in the city of Chicago, the business place of the company, and that its capital stock was limited to \$150,000, being divided into 1500 shares, of \$100 each. Its organization, so far as we are able to discover, seems to have been in strict conformity with the statutes. It was evidently the purpose of the promoters of this company that it should, as it subsequently did, supersede the Post and Mail Printing Company, an existing organization then engaged in the same business, proposed to be conducted on a more extensive scale by the new company, under whose management a daily newspaper, known as the "Chicago Post," was then being published, the said O. A. Willard being the president and general manager of that company also.

At the time of the organization of the new company the Post and Mail Printing Company was indebted to various individuals in the sum of \$45,000, which indebtedness was represented by forty-five notes of the company, for the sum of \$1000 each, and all secured by a deed of trust executed by the company to Arnold Tripp, as trustee, on the entire assets of the concern, ten of these notes belonging to appellee the Rock River Paper Company. Default having been made in the payment of these notes, the trustee, at the instance of the holders, proceeded to advertise for sale the mortgaged property. Pending this advertisement, to-wit, on the 28th of February, 1878, there was a meeting of the directors of the Chicago Publishing Company, at which a resolution was passed by the board authorizing and directing O. A. Willard, the president of the company, to bid at the trustee's sale the sum of \$45,000 for the property, franchises, etc., of the Post-

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Mail Printing Company, to be paid two years after date, with interest at the rate of ten per cent per annum, payable semi-annually, and to be secured by a mortgage on the property purchased. This resolution seems to have been adopted in pursuance of an arrangement which had already been made with the holders of the notes of the old company, to the effect that they would accept in payment of the indebtedness of the latter company the notes of the new company, of the character specified in the resolution. The effects and franchises of the old company were accordingly purchased at the trustee's sale, in pursuance of the above resolution and the understanding with the creditors of the old concern. The old notes were surrendered, and new ones given to the holders by the new company, which were secured by a deed of trust on the purchased property, as above stated, and from thenceforth the old company abandoned its organization and ceased to do business. On the 17th of March following, Oliver A. Willard, the president and business manager of the Chicago Publishing Company, died, and from thence until the filing of the bill in this case the stockholders of the company seemed to lose all interest in its success, and its affairs gradually grew worse, until it drifted into insolvency, and all its tangible effects, with the exception of some accounts, were sold under the deed of trust above mentioned, when it ceased to do business, and a receiver, under the present bill, was appointed to wind up its affairs. The record shows that many of the subscribers to the capital stock were at the time of their subscriptions, and still are, insolvent, and that but a small portion of the stock had been paid in before the commencement of the suit.

Answers were filed by appellants and some of the other defendants, alleging, in substance, the whole of the capital stock had not been subscribed; that many of the subscriptions were colorable, merely, and that the parties making them were notoriously insolvent, of all which appellees had

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notice; that the proposed organization of a new company was but a scheme devised by the managers of the old one to saddle the debts of the old concern upon unsuspecting subscribers who might be induced to take stock in the pretended new company, etc. The other defendants failed to answer, and were regularly defaulted.

The cause was referred to the master, whose report shows the total amount due from all the stockholders, the amount due from the solvent stockholders, the total amount of the company's indebtedness, and the names of the persons having claims against the company, and the amounts due them, respectively; and also, that after exhausting all the debts due from the solvent stockholders there will be an unpaid balance due from the company of \$14,473.66, unprovided for. Although such of the stockholders as interposed a defence to the bill were notified to appear before the master, for the purpose of taking such steps as they might deem proper with respect to the report of that officer before filing it in court, none of them appeared before him for such purpose, or took any exceptions to it, until after it was filed in court, and only one of the defendants, namely, appellant Hugh A. White, filed exceptions to it at all. The report of the master was approved by the court, and a final decree entered in accordance with its findings. From that decree sixteen of the defendants appealed to the Appellate Court, and the cause was there heard, resulting in an affirmance of the decree of the Superior Court. All of the defendants seem to have acquiesced in the judgment of the Appellate Court except James S. Jewell, David R. Dycke, Hugh A. White, and Thos. C. Hoag, the present appellants, who bring the record to this court for review.

Various reasons are assigned why the judgment of the Appellate Court should be reversed, none of which are deemed sufficient.

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It is first objected that the full amount of capital stock required by the articles of association before it could become a legally organized body, was never subscribed. Assuming this objection, if true, could be made available under the circumstances of this case, of which we deem it unnecessary to express any opinion, we are satisfied, from the proofs before us, the requisite amount of capital stock was subscribed. The articles of association certified by the Secretary of State, afford *prima facie* evidence of the fact, which has not, in our judgment, been overcome by anything appearing in the record tending to establish a contrary conclusion. This part of the controversy is narrowed down to the subscriptions of White, Miller and Culver. So far as the latter is concerned, we find no evidence at all tending to overcome the *prima facie* case made by the certified articles of association. As to Miller and White, they both admit having signed their names to the subscription book, in the list of the other subscribers, but deny having carried out the amount of their subscriptions in figures, and claim that they signed their names for the purpose, simply, of enabling Willard to exhibit them to others in his efforts to obtain subscribers, it being supposed, as we take it, that the mere sight of their names, without anything more, would be a strong incentive to others to subscribe. We frankly confess our inability to perceive the force or plausibility of this theory, however prominent or influential the parties may be. The more natural theory is, that if the amounts of their subscriptions were not carried out at the time, and were purposely left blank, the object in doing so was to enable Willard to represent them as subscribers when they were not, which would have been a palpable fraud on those subscribing through such an influence. It is well known that in becoming a party to an enterprise of that kind one is generally controlled, in a large degree, by the character of those who are, or who are expected to be, identified with it. Any artifice or trick, therefore, tending to mislead a sub-

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scriber in this respect would be highly reprehensible in morals, as well as a legal fraud. If, then, appellants signed the subscription book of the company in blank for such purpose, it is but fair and just to hold that as to creditors of the company they thereby impliedly authorized those empowered to take subscriptions to fill up the blanks, and that having been done in this case, as is claimed, appellants are estopped from questioning their authority to do so. The Superior and Appellate Courts both found the requisite amount of stock was subscribed, and that the company was properly and legally organized, and we think the evidence fully warranted them in doing so.

Again, it is claimed that the Post and Mail Printing Company was hopelessly insolvent, and that the organization of the new company was a mere shift or device to relieve those representing the old company and fasten its liabilities upon the stockholders of the new. We see no satisfactory evidence in the record to support this hypothesis. From a careful consideration of the whole of the testimony we are unable to say the assets of the old company were not, at the time it was superseded by the new, fully equal to its liabilities; but if they were not, it is difficult to perceive upon what legal hypothesis the creditors of the present company can be affected by that fact. By a resolution of the board of directors of the new company, its president was directed to purchase the effects of the old company at \$45,000, which was accordingly done, and by a mutual arrangement between all parties interested, this \$45,000 was paid by taking up and discharging the notes of the old company to that amount. In all this we do not see the slightest evidence of bad faith or unfair dealing.

It is also urged that a large portion of the stock of the present company is colorable and fictitious,—that the subscribers, in some instances, were notoriously insolvent, and in others it was expressly understood that payment was not

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expected or to be exacted, in other cases only a part of the subscription was to be paid, and in some instances payment was to be made in services of some kind instead of money. While it must be conceded there is some evidence tending to establish this claim, yet there are two sufficient reasons why it can not avail here: In the first place, it is clear that the creditors of the company can not be affected by mere private understandings between the subscriber and the subscription agent of the company, by which the former is exonerated from the performance of that which his subscription, by its very terms, plainly requires. To permit such a thing would be to sanction a palpable fraud upon the creditors of the company and the other stockholders. In the next place, we do not regard either of the appellants in a position to question this matter, even if it constituted a defence. It was by the court referred to the master for his consideration, and his report shows the total amount due from solvent subscribers, including the subscriptions of appellants, and no objections were made to that report before the master, and no exceptions were taken to it after it was filed in court, except by White, and, under the circumstances, he is in no better position than the others, for it is well settled that where matters of fact are referred to a master for his determination, it is the duty of the parties, when notified, as was done here, to appear before him and there contest the matter, and if his findings are not, in their judgment, supported by the evidence, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report if it should happen to be wrong; and if in such case, after hearing the objections, the master declines to modify or change his report, it is the duty of the objecting parties, after it has been filed in court, to appear there and file exceptions to it; and when this course has not been pursued, and no sufficient reason is assigned for not doing so, as was the case here, the report of the master, when approved by

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the court, will be deemed in this court conclusive upon the questions covered by it. *Hurd v. Goodrich*, 59 Ill. 450; *Pennell v. The Lamar Ins. Co.* 73 id. 303.

The fact that Willard was a man of limited means, and was a large subscriber to the enterprise, we regard, under the peculiar circumstances of this case, of no significance. It was a matter of public notoriety that he was chief editor of the "Post," and president and general manager of the old company, and it can hardly be doubted that all who subscribed to the new enterprise knew that it was intended to supersede the old company in the same business, and that one of its chief objects was to make the "Post" a success, and establish it upon a solid basis; and there is just as little doubt that the subscribers looked more to the personal qualifications of Willard, as editor of the paper and general manager of the business, for the accomplishment of those objects, than to his subscription to the capital stock. While it satisfactorily appears that in his great anxiety to perfect the new organization for the accomplishment of the objects just stated, he entered into private agreements with some of the subscribers which were inconsistent with the contract of subscription actually signed by them, and were therefore inoperative and void as to other subscribers and creditors of the company, yet in the light of all the facts before us we have no idea that any actual fraud was intended. In view of the fact that death has closed his lips so that he can not now speak for himself, it is more charitable to suppose that these things were attributable rather to an honest belief that the final success of the enterprise would make all things right, than to a deliberate purpose to injure or wrong any one. However this may be, we are satisfied none of these things furnish a sufficient reason for reversing the judgment in this case, and it will therefore be affirmed.

Judgment affirmed.

DOMINICUS BRIX

v.

AARON OTT.

Filed at Ottawa November 10, 1881.

1. **SPECIFIC PERFORMANCE**—*requisites of contract to authorise decree.* To authorize the specific performance of a contract it must be complete, specific and certain, as well as fair and honest,—not the result of mistake,—and must have been fully performed, or an ability and a readiness and an offer to perform, on the part of the party seeking its enforcement, must be shown.

2. **SAME**—*part performance and readiness to perform essential.* A part performance at least, with a readiness to perform the remainder, on the part of the complainant, is indispensable to authorize the specific enforcement of a contract.

3. **CONTRACT**—*when void for want of certainty in description.* A contract was as follows: "This is to certify to an agreement between D. B. and myself, that he is to bid off the land now advertised by myself, and sold on Monday next, and give up same on following terms, namely: to have two acres at spring, each side of spring, one to make a square; and also to have use of surplus water flowing from springs west of road; and two acres south of spring on hill, to be used for waterworks, and to be in my use until he needs it," signed "A. H. Ott" and "D. Brix, M. D.,"—when the facts were that Ott had never advertised the same for sale, but it was advertised for sale by another person for a debt due one Y, under a trust deed, and it appeared there were several springs on the land advertised, and that Brix failed to bid off such land, when it was struck off to Ott: *Held*, the contract was too vague and uncertain, both as to the land out of which the parcels were to be taken and retained, and as to their location and shape or form, to be specifically enforced.

4. **TENDER**—*what it admits.* A tender of any kind is only an admission to its extent, and no further. When made it only admits the fact of the tender, with all of the conditions, limitations and terms at the time imposed. Therefore the tender of a deed for land or interest therein binds the party making it to its terms and conditions, and no further.

WRIT OF ERROR to the Circuit Court of Henry county; the Hon. JOHN J. GLENN, Judge, presiding.

The plaintiff in error, the complainant below, owned a tract of land near Geneseo, on which were several valuable

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springs. He conveyed it by trust deed to one Steel, to secure a debt of \$3500 to one Young, which he was unable to pay, and the premises were advertised for sale by the trustee,—sale to be on Monday, February 17, 1879. Anxious to reserve the springs, which he regarded as possessed of medical properties, and with regard to which he had some plans, he tried to find a purchaser who would take the land for the debt and leave him the ownership of the springs and a small portion of the ground. After several weeks negotiation he came to an agreement with the defendant, which appears in the opinion. This writing was made February 15, 1879,—the Saturday before the sale. The parties attended the sale together. When Steel, acting as trustee, cried the land, Brix made no bid, and after a pause Ott bid it off for the debt and costs. Brix says that it was understood between them that Ott should bid it off and have it for the debt and costs, and that he was himself only to bid against persons offering more. Ott denies that there was such an understanding, but admits that he got the land for precisely what he agreed to give.

Ott testified that he considered himself released from all obligations by the failure of Brix to bid. A few days after his purchase he mortgaged the premises to Mary E. Bell, without reference to Brix or notice to her of Brix's claim. In a short time, however, he went with Brix to the ground, and they measured the distance from the spring to the top of the hill—1200 feet. Several months elapsed, and Brix insisting upon a deed Ott tendered him a conveyance of a right to use the premises for waterworks only. Brix refused, for two reasons: first, that the deed was a quitclaim deed, and Ott, since obtaining the title, had incumbered the premises; and second, because the deed conveyed only an easement, instead of the land itself.

Brix filed his bill to compel a conveyance of the land, with proper covenants against the incumbrance. A demurrer was

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sustained to the bill, on the ground the contract was too vague to be enforced, whereupon Brix amended by praying in the alternative that if the contract should be found too vague to be enforced, it might be rescinded and the land restored after a proper account of Ott's expenditures and receipts, and with due regard to the rights of his mortgagee.

Mr. GEO. W. SHAW, for the plaintiff in error, argued upon the facts, insisting that the contract was sufficiently certain, and that Brix had substantially performed on his part.

Counsel contended that this case is much stronger than *Fowler v. Redican*, 52 Ill. 405, where a contract more defective than this was held sufficient to compel a conveyance.

The tender of the deed admitted defendant's liability, and disposed of all his pretended defences. *Monroe v. Chaldick*, 78 Ill. 429.

If Brix substantially complied with his contract he was entitled to relief, even if the contract had been too vague for enforcement. In such cases courts rescind the contract and place the parties in their former position. Fry on Specific Performance, 311; *Henry County v. Winnebago Sp. Dge. Co.* 52 Ill. 461.

Mr. CHARLES DUNHAM, for the defendant in error:

A contract, to be specifically enforced, must be complete, specific and certain, as well as fair and honest, and not the result of mistake, and not voluntary, and must have been fully performed on the part of the person seeking its enforcement. Fry on Specific Performance, p. 154, (*90, sec. 203,) *et seq.* 159, 165, (*102,) 166, 168, 169; *Fitzpatrick v. Beatty et al.* 1 Gilm. 454; 1 Story's Equity, secs. 764, 767, 769, 776; *Parkhurst v. Van Courtlandt*, 1 Johns. Ch. *274; *Gosse v. Jones*, 73 Ill. 508; *Bowman v. Cunningham*, 78 id. 48.

To avoid the Statute of Frauds the written agreement must contain all the essential terms, and leave no such terms

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to be proven by oral evidence. *Parkhurst v. Van Courtlandt*, 1 Johns. Ch. 274; Fry on Specific Performance, pp. 228-30 (*159); 1 Sugden on Vendors, pp. 237, 238.

The description of the subject of the contract must be so definite that it may be known with certainty, and if insufficiently described, oral evidence is inadmissible to show what lands the parties meant, upon a bill for specific performance. Fry on Specific Performance, 157, 158, note 4; *Richardson v. Godwin*, 6 Jones' Eq. 229.

Patent ambiguities can not be aided by oral evidence. 2 Starkie on Evidence, 544, 548, 562; 1 Sugden on Vendors, p. 259, and cases before cited.

The contract can not be partly in writing and partly in parol, both made at the same time, or the written part last. *Howe v. Barker*, 3 Johns. 509; Story's Equity, sec. 769; 1 Johns. Ch. 283, *supra*; *Doyle et al. v. Teas et al.* 4 Scam. 202.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Plaintiff in error was the owner of a tract of land in Henry county, near the city of Geneseo, on which there are several springs. It was incumbered by a trust deed to secure \$3500, and for the payment of which the land was advertised to be sold on the 17th day of February, 1879. On the 15th day of that month the parties to this suit entered into this agreement:

"GENESEO, ILL., Feb. 15, '79.

"This is to certify to an agreement between D. Brix and myself, that he is to bid off the land now advertised by myself, and sold on Monday next, and give up same on following terms, namely: To have two acres at spring, each side of spring, one to make a square; and also to have use of surplus water flowing from springs west of road; and two acres south of spring on hill, to be used for waterworks, and to be in my use until he needs it.

A. H. OTT,
D. BRIX, M. D."

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The sale occurred as advertised, but plaintiff in error failed to bid off the property, although present at the sale. Thereupon defendant in error bid, and became the purchaser for the amount of the debt and interest. Steel, the trustee, executed to him a deed, and he took possession and still retains it.

Defendant in error made a quitclaim deed for the use of two acres, embracing a spring on the west line of the quarter, and two other acres, to be used for the erection of waterworks to supply Geneseo with water. He tendered this deed, but it was rejected. Plaintiff in error claimed a deed conveying the fee, and not a mere easement or use of the property described in the deed, and that the property had been incumbered by mortgage by defendant in error after the sale, and the deed was not therefore a compliance with the contract. Plaintiff in error thereupon filed his bill for a specific performance of the contract. He afterwards amended his bill, asking for a rescission and for an assessment of damages in case the contract could not be decreed specifically performed. A hearing was had, and the circuit court dismissed the bill, and complainant prosecutes error to reverse the decree of the circuit court.

The question upon which the decision of this case turns, is whether the contract, by its terms, is sufficiently specific and certain to require a decree directing it to be specifically performed. The well and generally recognized rule is, that to be specifically enforced a contract must be complete, specific, certain, as well as fair and honest,—not the result of mistake of intention,—and must have been fully performed, or an ability and a readiness and an offer to perform his part, by the party seeking its enforcement. See *Fitzpatrick v. Beatty*, 1 Gilm. 454, *Gosse v. Jones*, 73 Ill. 508, and *Bowman v. Cunningham*, 78 id. 48. A part performance, at least, with a readiness to perform the remainder, on the part of the party complaining, is regarded as indispensable to authorize the enforcement of the contract.

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This contract specifies no particular tract of land. But it is said that it refers to land advertised by defendant in error, and to be sold on the Monday following. But it may be replied there is no pretence that defendant in error had advertised any land to be sold on that or any other day. This land was then advertised by Steel to be sold on the next Monday, to pay a debt plaintiff in error owed to one Young, and in which, so far as the evidence shows, defendant in error did not have the slightest interest. Then how can it be said that this agreement, either directly or remotely, refers to that advertisement, or the land in controversy?

But even if it could be conceded that the land might be ascertained by a reference to Steel's advertisement, which we do not now decide, still the body of the agreement is altogether vague and indefinite as to the land to be reserved to or held by plaintiff in error. There is no general description of the land in which the specific lands claimed are situated. But if that could be found, then where will we commence to locate the two acres at the spring, or the two acres south of the spring on the hill? Surely no surveyor, whatever his skill, could determine from the agreement. There are several springs, and who can possibly know which spring is referred to, by the agreement? There is nothing from which it can be ascertained. But if the spring referred to could be certainly known, where are we to start to locate the two acres? The agreement says it is to be at and each side of the spring, and one to make a square. What to make a square? If it is one side, which side, and what is the side of the spring? And what is to be the size and shape of the other side? This is utterly indefinite as to the place, the form, or the beginning or ending of the lines bounding the tract to be embraced in the two acres.

As to the other two acres, its want of description is as apparent as the other. If we take the spring on the line and road on the east, then no part, or but a few inches, perhaps,

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or a few feet at most, of the two acres on the hill can lie south of that spring. Practically, it would all lie west of that spring. Then, if we take either of the other four springs lying west of the one on the east line, south of which shall the two acres be located? But if the hill extends but a short distance west of the second spring from the line, south of which of these two shall it be located? And if located, on what part of the hill, and what shall be its shape? None of these questions are answered by the contract, and all are presumed to know that a contract can not be partly-written and partly verbal.

We are referred to the case of *Fowler v. Redican*, 52 Ill. 405, as an authority requiring the admission of extrinsic evidence to locate the two tracts. That case differs widely from this in its essential facts. There, possession was taken, and valuable improvements made, under a written memorandum, which, if not sufficiently specific, and had been rejected, outside of the written memorandum there was a clear, specific and unambiguous verbal contract, under which the purchaser had entered into possession, made improvements, and paid a part of the purchase money. This was sufficient, independent of the written memorandum, and had it been wholly rejected, to authorize a decree for a specific performance. In that case the memorandum referred to verbal representations, which it was held might be proven because they were referred to by the memorandum. Moreover, that case carries the doctrine of such explanation to the extreme verge of the rule, and we do not feel inclined to extend it to other cases not similar in character. This case is widely dissimilar, and the doctrine of that case is not therefore applicable to this.

It is urged that inasmuch as defendant in error tendered a quitclaim deed, he thereby admitted or specified the places where and the form in which the locations were to be made. A tender of any kind is only an admission to its extent, and no further. When made, it only admits the fact of the

Syllabus.

tender, with all of the conditions, limitations and terms at the time imposed. Nothing further can be inferred from it. It then follows that the tender of this deed only bound defendant in error to its terms and conditions.

We perceive no error in this record, and the decree of the court below must be affirmed.

Decree affirmed.

CHARLOTTE LEQUATTE *et al.*

v.

STUART R. DRURY *et al.*

Filed at Ottawa November 10, 1881.

1. CHANCERY—*laches*—*when a bar to relief*. Equity will not assist a party who has not been reasonably diligent in asserting his rights. Stale claims will not be encouraged, since by the lapse of time there must of necessity be great difficulty in arriving at the exact facts of the case; and this rule will be applied as a bar to relief sought against a trustee.

2. On a bill for the partition of land in which the complainants claimed an equitable title, and that the defendant held the legal title in trust for them, which bill was not filed until thirteen years after the defendant obtained his deed, under which he had ever since claimed the land against all others, the defendant in his answer set up the *laches* and delay of the complainants as a defence: *Held*, that the *laches*, unexplained, was such as to constitute a bar to the relief sought.

3. ERROR WILL NOT ALWAYS REVERSE—*exclusion of evidence*. The exclusion of the testimony of a defendant, when called by the complainants to prove facts occurring before the death of a common ancestor under whom both parties claim, if error, is no ground for the reversal of a decree dismissing the bill, where the *laches* of the complainants has been such as to bar any claim to relief.

WRIT OF ERROR to the Circuit Court of Rock Island county;
the Hon. JOHN J. GLENN, Judge, presiding.

101	77
139	308
101	77
156	648
101	77
100	574

Briefs of Counsel.

MESSRS. SWEENEY, JACKSON & WALKER, for the plaintiffs in error:

The court erred in excluding the testimony of Eli and Silas Drury, two of the defendants, when called by the complainant. Stuart R. Drury, by his answer, did not claim title as an heir or devisee of Isaiah Drury, but claimed the lands were conveyed to him with the consent of Isaiah Drury in his lifetime. His defence was, that he was a *bona fide* owner, independent of all questions of heirship.

The objection to the competency of the witnesses was based on sec. 2, chap. 51, Rev. Stat. 1874. This section is intended to apply to cases where the guardian, heir, etc., is a party to the suit in a representative capacity, and has no application to a case like this. *Bivens et al. v. Harper*, 59 Ill. 19; *Branger et al. v. Lucy*, 82 id. 91; *Fischer v. Fischer*, 54 id. 231; *Pigg et al. v. Carroll et al.* 89 id. 206.

MESSRS. OSBORN & CURTIS, for the defendants in error:

The complainants not being able to recover in any event, owing to their *laches* and the staleness of their demand, this court will not reverse for a possible error in the exclusion of evidence, as it could not have done the complainants any harm.

The *laches* of the complainants is such as to form a bar to any equitable relief. Story's Eq. Jur. sec. 1520; *Rogers v. Simmons*, 55 Ill. 76; *Carpenter v. Carpenter*, 70 id. 457; *Hough v. Coughlan*, 41 id. 133; *Thompson v. Bruen*, 46 id. 125; *Alexander v. Hoffman*, 70 id. 114; *Brink v. Steadman*, id. 241; *Walker v. Douglas*, id. 446; *Roby v. Cassitt*, 78 id. 639; *McLaurie v. Barnes*, 72 id. 73; *Iglehart v. Vail*, 73 id. 63; *Fitch v. Williams*, id. 92; *Hedenburg v. Jones*, id. 49; *Cox v. Montgomery*, 36 id. 396; *Hall v. Fullerton*, 69 id. 448; *Dempster v. West*, id. 613; *Beach v. Shaw*, 57 id. 25.

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Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was to have partition made among the several heirs, of the lands of which it is alleged Isaiah and Priscilla Drury were either the legal or equitable owners at the time of their death. Only as to a portion of the lands described in the bill is there any contention in this court, and as to them the bill was dismissed in the circuit court, and as to the residue a decree of partition was rendered by the court on the hearing. To the latter part of the decree no objection is made.

As respects the lands concerning which the bill was dismissed, complainants insist Isaiah Drury, at the time of his death, was the equitable owner. The legal title had been or was in Eli Drury, in trust, as it is alleged, for Isaiah Drury. It seems Eli Drury and Stuart R. Drury, or one of them, were indebted to one Andrews, since deceased, and to secure that indebtedness Eli Drury conveyed these lands to him. That indebtedness was afterwards discharged. Anticipating that his death might soon occur, Andrews desired to reconvey these lands, and accordingly he deeded the same to Stuart R. Drury, without the consent of Eli Drury, as is charged in the bill. This conveyance by Andrews to Stuart R. Drury was made in 1858, and since the death of Isaiah Drury, which occurred in 1854. Since that time Stuart R. Drury has held the legal title to these lands, under the deed from Andrews, claiming to be the owner, in opposition to all the other heirs of Isaiah Drury. The bill proceeds on the theory, although the legal title is in Stuart R. Drury, equitably these lands belong to the estate of Isaiah Drury, and partition should be made of them among his heirs at law.

The answer of Stuart R. Drury to the bill is under oath, and in it he denies that Isaiah Drury was the owner of these lands, or that the legal title to them was ever in Eli Drury in trust for him, as charged in the bill, but insists the legal

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title was in Eli Drury in trust for respondent, and then explains how and for what purpose the lands were conveyed to Andrews, and then reconveyed to him. It is distinctly alleged in the answer of defendant, that Isaiah Drury, in his lifetime, knew of the conveyance of the premises to Andrews, and never claimed any interest in them after they had been redeemed from a certain sale by defendant.

Some questions of minor importance have been pressed on the attention of the court, but it is not deemed necessary to remark upon them, as it is thought best to place the decision on matters more nearly affecting the merits of the cause.

On the trial of the cause before the court, complainants offered as witnesses in their behalf, Eli and Silas Drury, two of defendants, who are heirs at law of Isaiah Drury, to prove facts in relation to the creation of a trust in these lands, and other facts occurring prior to the death of the common ancestor, as set forth in the bill. To the admission of the testimony of the witnesses offered, defendant Stuart R. Drury objected, on the ground the witnesses were parties to the suit, and heirs of the common ancestor, and therefore directly interested adversely to defendant interposing the objection, and who defends as heir at law of Isaiah Drury; which objection was by the court sustained. That decision is the only error insisted upon in the argument as a ground for the reversal of the decree of the circuit court.

It may be conceded, that under the decision of this court in *Pigg v. Carroll*, 89 Ill. 206, the witnesses called on behalf of complainants to testify concerning facts alleged in the bill as having occurred prior to the death of the common ancestor, were entirely competent for that purpose. Exactly what complainants wished to prove by the witnesses is not definitely stated. Assuming, however, the material facts alleged in the bill as having happened before the death of the common ancestor would be established by their evidence, still it

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is apparent no harm was in fact done complainants by the exclusion of the testimony, for the reason they have been guilty of such *laches* in asserting the rights they now claim that no decree could pass in their favor. Whatever rights complainants may have had in these particular lands came to them on the death of Isaiah Drury, in 1854, and certainly as early as 1858, when Andrews reconveyed the premises to Stuart R. Drury.

The bill in this case was not filed until April, 1871. A period of seventeen years since the death of the ancestor, and of thirteen years since defendant obtained a deed for the premises, under which he has claimed the title as against all others, was suffered to elapse before complainants undertook to assert any claim to any portion of the premises. The *laches* of complainants is distinctly insisted upon in the answer of defendant as a bar to any relief. The record, however, is absolutely barren of any evidence that even tends to explain or excuse the unusual delay that has intervened before asserting the rights complainants now claim in the premises. It is not shown complainants were ignorant of the situation of the property at the time of the death of the ancestor, and at the time of the making of the deed by Andrews to defendant. In the absence of proof to the contrary it must be assumed they were familiar with the transactions concerning these lands as they occurred, and if they were, they ought to have asserted the claim they now put forth at a time when the facts were fresh in the minds of the parties, and susceptible of satisfactory proof. Equity will not assist a party who has not been reasonably diligent in asserting those rights concerning which its aid is invoked. It is for this reason stale claims will not be encouraged, since by the lapse of time there must, of necessity, be great difficulty experienced in ascertaining the exact facts as to the matter in controversy.

Syllabus.

The doctrine of what the law calls *laches*, has been applied to cases of trust. 2 Story's Eq. Jur. sec. 1520 a. Unreasonable delay, unexplained on the part of one asking equitable relief, has been held to be a bar to the relief sought, even against a trustee, in cases in this court. *Rogers v. Simmons*, 55 Ill. 76; *Carpenter v. Carpenter*, 70 id. 457. The case at bar comes within the principle of the cases *supra*, and the decree of the circuit court must be affirmed.

Decree affirmed.

THE CHICAGO LIFE INSURANCE COMPANY

v.

THE AUDITOR OF PUBLIC ACCOUNTS.

Filed at Ottawa November 10, 1881.

1. DISSOLUTION OF INSURANCE COMPANIES—*constitutionality of act of 1874*. The statute of 1874, which authorizes the Auditor to take proceedings for the dissolution of a life insurance company organized in this State under a special charter, granted prior to the passage of that act, whenever he shall be of opinion that such company is insolvent, or its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public, or when the company has failed to comply with the rules, restrictions or conditions provided by law, is not unconstitutional, as impairing the obligation of contracts, especially when such a company has accepted an amendment of its charter, which declares that it shall not be deemed to exempt the company from the operation of such general laws as might afterwards be passed.

2. SAME—*act whether special, regulating practice in courts*. A statute for the dissolution of insurance companies for insolvency, etc., and providing the mode of procedure to have such corporations dissolved, which applies alike to all insurance companies, is not a special law regulating the practice in courts of justice, within the prohibition of sec. 22 of art. 4 of the constitution of 1870.

3. SAME—*change of remedy against insolvent company*. The general Insurance law of 1869 provided, that on notice by the Auditor an insurance company should cease issuing policies, where its assets were not equal to its liabilities, until its funds should be made equal to its liabilities. In 1874,

101	82
137	275
101	82
148	205

101	82
207	1824

Syllabus.

another and different penalty was provided for insolvency, etc., viz: a dissolution of the corporation: *Held*, that the legislature had the right to change the penalty and remedy, and that the later law must govern.

4. *SAME—evidence sustaining a decree of dissolution.* By the charter of a life insurance company, \$100,000 of stock had been subscribed as required, but only ten per cent thereof had been paid in, and the evidence showed that in 1867 the remainder was professedly paid by the notes of the subscribers, payable in nearly all cases on demand, and without interest, payment of which was never demanded, and which were in no way secured, under which the company proceeded to insure, and from 1871 to 1876 made false reports of a capital stock of \$125,000 paid up in cash, and during the same time made dividends, in violation of its by-laws, of \$55,045, when it was in no condition to pay any dividends, and from 1873 to 1876 it scheduled securities, amounting to \$89,422, which it had bought but had never paid for, and made false reports of its receipts and expenditures, and on examination of its affairs and books they showed a heavy deficiency of assets to meet its liabilities: *Held*, that a decree for the dissolution of the company was warranted.

5. *SAME—unpaid securities are not assets.* Securities taken in the name of an insurance company, in the expectation of becoming its property when paid for, but not paid for, are not *bona fide* assets of the company, and exhibiting them as such in the company's report to the Auditor is deceptive to him, and to persons taking insurance, and to the public.

6. *SAME—good will is not assets.* An insurance company can not establish its solvency, such as the statute requires, by proof that its good will is of the value of \$100,000 to \$150,000. This can not be treated as assets of the company. The assets required by law are funds that will pay losses and liabilities of the company.

7. *SAME—deficiency of assets—how found.* Under the Insurance law of 1869, where the actual funds of any life insurance company are not of a net value equal to the net value of its policies, according to the "combined experience," or "actuary's" rate of mortality, with interest at four per cent per annum, the Auditor is required to give notice, etc. Under this law it is not proper to estimate on the basis of six per cent in determining the impairment, but the four per cent basis as fixed in the law must govern as showing the deficiency of assets.

8. *SAME—standard of solvency.* The law requires a higher standard of solvency in an insurance company than that its assets shall be sufficient to meet and pay its matured liabilities. It requires that its assets shall be equal to all its liabilities, whether due or not.

9. *SAME—offer to re-insure, no defence to proceeding to dissolve corporation.* In a proceeding by the Auditor to have a life insurance company dissolved, under the general law of 1874, for insolvency, an offer by the company to re-insure in other companies for its policyholders is no defence, and can not be taken as making up the company's deficiency of assets.

Brief for the Plaintiff in Error.

10. SAME—*responsible for the acts of its officers.* The fact that the mismanagement of an insurance company, making its condition such as to be hazardous to the public and parties insured, is attributable to the secretary alone, is no defence to a proceeding by the Auditor to close its business. The public are entitled to protection, no matter by whom the affairs of the company have been mismanaged.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. C. C. & C. L. BONNEY, for the plaintiff in error, made the following among various other points:

The act under which this proceeding was had impairs the obligation of the contract in their charter. Const. of the United States, sec. 10, art. 1; const. of Illinois, 1870, sec. 14, art. 2.

The act contravenes sec. 22 of art. 4 of the State constitution, which declares that the legislature shall not pass special laws regulating the practice in courts of justice.

The law of 1874 was not intended to apply to corporations formed under special charters prior to the adoption of the present constitution. *Union Ins. Co. v. Frear Stone Mfg. Co.* 97 Ill. 545; *Wincock et al. v. Turpin*, 96 id. 144.

The legislature has no power to impose arbitrary and oppressive conditions upon the assertion and exercise of vested rights. *Conway v. Cable et al.* 38 Ill. 87.

The law never favors forfeitures by construction. All laws providing forfeitures must be strictly construed. *Chicago v. Rumpff*, 45 Ill. 99; *Hartford Ins. Co. v. Walsh*, 54 id. 168; *Baker et al. v. Admr. of Backus*, 32 id. 109; *First National Bank of Sioux City v. Gage et al.* 79 id. 209.

Definition of solvency: Burrill on Assignments, 38, 40; Bouviers' Law Dic. title "Insolvent."

The right to compel a substantial performance of the contract can not be taken away under a pretence of regulating the remedy. *Walker v. Whitehead*, 16 Wall. 317; *Merton v. Valentine*, 15 La. Ann. 153.

Brief for the Defendant in Error.

The legislature has not the power to add new and independent conditions to a grant, such as a wider draw for a bridge than required by the original act. *Commonwealth v. Breed*, 4 Pick. 460.

In a proceeding to forfeit corporate franchises, the alleged unlawful acts must be alleged to have been willfully or negligently done. *Attorney General v. M. V. and C. R. R. Co.* 51 Miss. 606.

A temporary suspension of specie payment by a bank does not work a forfeiture of its charter, especially when a penalty of twelve per cent is provided. *State v. Commercial Bank*, 10 Ohio, 538.

The legislature has no power to impose on corporations new causes of forfeiture subsequent to their charters. It may prescribe new modes of remedy, but can not change the conditions of the contract. *Aurora Co. v. Hotthouse et al.* 7 Ind. 61; *Powell v. Sammons et al.* 31 Ala. 558; *State v. Noyes*, 47 Maine, 214; *People v. Jackson and Michigan Plank Road Co.* 9 Mich. 285; *State v. Tombeckee Bank*, 2 Stew. (Ala.) 36; *Bailey v. Railroad Co.* 4 Harring. 399.

A reservation of power to alter, modify or repeal a charter, does not authorize the legislature to impose an additional burden of expense, without compensation. *Miller v. Railroad Co.* 21 Barb. 513; *Holyoke Co. v. Lyman*, 15 Wall. 522.

Mr. E. B. SHERMAN, for the defendant in error, among various others made the following points of law:

The acts of 1869 and 1874 are constitutional and valid, and are not contrary to the constitution of the United States. *Ward v. Farwell*, 97 Ill. 593; Angell & Ames, sec. 774, and cases cited; *Ohio and Mississippi R. R. Co. v. McClelland*, 25 Ill. 140; *Bank v. Willard*, 24 id. 140; *Moore v. Whitcomb*, 48 Mo. 543; *Munn v. People*, 69 Ill. 93; *Munn v. Illinois*, 4 Otto, 113; *In the matter of Jackson*, 4 Sanford, 596; *Slee v. Bloom*, 19 Johns. 71; *Slee v. Bloom*, 5 Johns. Ch. 380;

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Gowen v. Penobscot R. R. Co. 44 Maine, 140; *Inhabitants of Veazie v. Mayo*, 45 id. 560; *Commonwealth v. F. and M. Bank*, 21 Pick. 542; *Com. Bank of Rodney v. State*, 4 S. & M. 439; *Missouri v. Matthews*, 44 Mo. 523; *Bank v. Attorney General*, 3 Wend. 588; *Tennessee v. Sneed*, 6 Otto, 49; *Fertilizing Co. v. Hyde Park*, 7 id. 659; *Turnpike Co. v. People*, 82 Ill. 174; *United States v. Union Pacific R. R. Co.* 8 Otto, 605.

If the English language can convey an idea clearly and unmistakably, then the words "any insurance company," employed in the law of 1874, include life insurance companies as well as fire insurance companies, and authorize proceedings against either.

The Chicago Life Insurance Company, by virtue of an amendment to its charter, adopted February 21, 1867, and accepted by it, is specifically made subject to all general laws regulating insurance companies thereafter to be enacted; and the law of 1869 regulating life insurance companies, and the act of 1874 regarding the dissolution of insurance companies, thereby virtually became, when enacted, a part of its charter.

Mr. JUSTICE SHELTON delivered the opinion of the Court:

This was a petition filed by Thomas B. Needles, Auditor of Public Accounts of the State, in the circuit court of Cook county, at the July term, 1877, against the Chicago Life Insurance Company, under the "Act in regard to the dissolution of insurance companies," approved February 17, 1874, praying that the company be enjoined from further proceeding with their business. Upon final hearing, at the July term, 1881, the court made a decree perpetually enjoining the company from the further prosecution of its business, and the company appealed.

The statute under which the petition was filed authorizes the proceeding whenever the Auditor shall be of opinion that the company is insolvent, or its condition such as to render

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its further continuance in business hazardous to the insured therein, or to the public, or where the company has failed to comply with the rules, restrictions or conditions provided by law.

The point is made that the statute under which this proceeding is had, is, as applying to this company, unconstitutional. This question of constitutionality is fully settled by the recent decision of this court in *Ward v. Farwell*, 97 Ill. 593, where it was decided that this act of 1874 was constitutional, and that it was so as applied to the Republic Life Insurance Company, incorporated under a special charter granted before the passage of the act of 1874, to-wit, March 22, 1869, in whose charter no specific reservation of legislative control was contained. By section 5 of an act amending the charter of the present company, approved February 21, 1867, it is provided as follows: "This act, and the act to which this is an amendment, shall not be deemed to exempt said company from the operation of such general laws as may be hereafter enacted by the General Assembly on the subject of life insurance." Afterward, on March 29, 1867, said amendment to the charter, of which the foregoing was a part, was formally adopted by the company. This strengthens the application of the decision in *Ward v. Farwell* to the present case.

There is one point of objection against the constitutionality of the statute made in this case, which it is said was not raised in the case of *Ward v. Farwell*, viz: that it is a special act regulating the practice in courts of justice, and providing a different method of procedure for a single class of corporate persons from that required in all other cases, and thus is in violation of section 22 of article 4 of the constitution of the State, prohibiting the passage of special laws regulating the practice in courts of justice. This method of procedure is applicable to all insurance companies, and is not special legislation, and does not come within such prohi-

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bition. Various other points are made against the validity of the act of 1874, but we consider all of them to have been fully met and decided in favor of the act in *Ward v. Farwell*, and that it is unnecessary to notice them further.

It is contended that the proofs do not make a case, under the law.

It appears from the evidence that before the change of the corporate name of the company by the amendment to its charter of February 21, 1867, \$100,000 of stock had been subscribed for, and ten per cent thereof paid in cash, that being the only payment in cash upon such stock subscriptions, with perhaps one exception; that the remainder of such subscriptions to the stock, after the change of its corporate name, was professedly paid for by the notes of the stock subscribers, payable in nearly all cases on demand, and without interest, the payment of which notes was never demanded by the company, and the notes were not secured by a deposit of real estate security and other collaterals. The company proceeded to do business with no other capital or resources. From 1871 to 1876 the company made annual sworn reports to the Auditor of the State, pursuant to the law of 1869, in all of which the capital stock of the company to the amount of \$125,000, was stated to be fully paid up in cash. In 1871 the company began to declare dividends to the stockholders, which were regularly declared to 1876, the amount being \$55,045, and this in violation of a by-law that all dividends should be applied in payment of capital stock subscribed, until the same should be paid; and during the time the company was not in a condition to justify the paying of any dividends. In the annual sworn statements made to the Auditor, from 1873 to 1876, there were included and scheduled as part of the assets of the company a large amount of securities for which it had never paid, and which it did not own, they amounting, in 1876, to \$89,422. The receipts of the company as shown by its books, varied largely from its

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receipts as shown in its sworn reports to the Auditor, such discrepancy in the total receipts, from 1871 to 1876, appearing to be \$95,006.46. There was the like discrepancy as to disbursements, they appearing for that same time, as reported to the Auditor, to be \$22,777.50 more than they actually were. In June, 1877, the Auditor caused an examination to be made of the affairs of the company, and when the examiner was ready to trace the securities through the company's cash book, to see whether the company actually owned the securities it claimed, the secretary of the company suddenly disappeared and absconded. It appeared that the value of the assets of the company was \$196,685, the liabilities \$344,857, including net present value of policies on four per cent basis, showing a deficiency of assets of \$148,171.58.

It is attempted to mitigate this unfavorable showing of the financial condition of the company in various ways. As the securities before mentioned stood in the name of the company, the legal title appearing to be in the company, it is claimed that they ought to be regarded as assets of the company. The company had paid nothing for them, and they were not actually the property of the company. It would appear that they had been so taken in the name of the company with the expectation of their becoming its property when it might afterward be in funds and pay for them. They were not *bona fide* assets, and the exhibiting of them as such in the company's reports to the Auditor was deceptive to him, to persons taking insurance, and to the public.

Evidence was introduced that the good will of the company was of the value of \$100,000 or \$150,000, and it is claimed that this should be counted an asset of the company. The good will of the company would be a poor species of assets to pay losses with, and it is funds which will pay losses, that an insurance company is required by law to have.

The examiner of the condition and affairs of the company, appointed by the Auditor, made report, containing among

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"liabilities" this item: "Net present value of policies, actuaries 4 per cent, \$333,276," and appended to the footing of liabilities was, "leaving an impairment of \$148,171.58. The impairment, on the American six per cent, or commercial, basis, would be \$75,205.58." The reason or significance of this last clause appearing in the report is not apparent, but the company's counsel takes advantage of this, and insists that the estimate should have been on the last named six per cent basis, so greatly lessening the deficiency of assets as estimated on the four per cent basis.

Section 10 of the general act for the regulation of the business of life insurance, approved March 26, 1869, Revised Statutes 1874, p. 604, provides as follows: "When the actual funds of any life insurance company doing business in this State are not of a net value equal to the net value of its policies, according to the 'combined experience,' or 'actuary's' rate of mortality, with interest at four per cent per annum, it shall be the duty of the Auditor to give notice to such company, and its agents, to discontinue issuing new policies within this State, until such time as its funds have become equal to its liabilities, valuing its policies as aforesaid."

The four per cent basis prescribed by this law must certainly govern, and the impairment of the assets of the company upon this basis, instead of on the "American six per cent, or commercial, basis," must be taken as showing the deficiency of assets. The legislature, in the protection of the public, might to that end well prescribe what amount of assets and degree of solvency an insurance company should possess, and on what basis it should be estimated. It would be a proper exercise of the police power. The validity of such a provision is sufficiently vindicated by the principles laid down in the *Ward case*, and further remark thereon is not required. This company is subjected to the operation of this law by the acceptance of the amendment to its charter, before adverted to, made February 21, 1867.

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In this connection may be noticed the point made, that this general Insurance law has prescribed what shall be the penalty for a deficiency of assets, to-wit: that the company shall discontinue issuing new policies, until such time as the funds of the company have become equal to its liabilities, and a disregard of that provision by any officer or agent is made punishable by a fine not exceeding \$1000. It is insisted that this is exclusive, and must be the only consequence of deficiency of assets. This general Insurance law was passed in 1869. It would surely be competent for a subsequent legislature, in 1874, to prescribe another and different penalty and remedy, and such proceeding as the act of 1874 authorized to be taken may be resorted to, whatever be the law of 1869. Insolvency is one of the causes named for the proceeding under the act of 1874.

It is said, on behalf of the company, that as soon as the impairment of the assets of the company was discovered, the company proposed to the Auditor to effect a re-insurance of all the outstanding risks of the company, and it is claimed that should be taken as making up any deficiency of assets. The evidence is vague as to any offer of re-insurance. It is found in the testimony of the examiner, who, after first stating as his recollection that there were two offers made to re-insure all the risks of the company in some company satisfactory to him, then proceeds: "My recollection is, that if I communicated with the Auditor with regard to re-insuring those risks, it was on a proposition made by some other company to do what we call 'twist' the policies,—not for the company to re-insure all of its risks at once, but to give another company the privilege of coming in and issuing new policies of its own to each individual policyholder, on such terms as they could make with the policyholders themselves, and take their pay out of such assets as they might choose of the company. I think there was a proposition of that kind made, and I think it was refused, either by myself or after

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communication with the Auditor." The real ground of complaint would seem to be that the Auditor proceeded in the precise course pointed out by the statute, and did not go outside of the line of his duty, and stop to negotiate and bargain with the company. We can not make out of this alleged offer of re-insurance anything which should be held as a defence to this proceeding, or be taken as making up the company's deficiency of assets.

As the matured liabilities of the company, at the time of commencing the Auditor's suit, did not exceed \$8400,—which could be paid on demand,—it is contended the company was not insolvent, and authorities are cited to the effect that when a debtor is able to meet all his engagements as they become due, in the ordinary way, he is solvent. It is a higher standard of solvency than this which our law requires of insurance companies. The general Insurance law, before referred to, directs that when the actual funds of any life insurance company are not of a net value equal to the net value of its policies, according to the mode of valuation there named, the Auditor shall notify the company to discontinue issuing new policies, until such time as its funds have become equal to its liabilities, valuing its policies as directed. This is an expression of the sense of the legislature of the degree of solvency a life insurance company should have, and it requires its assets to be equal to the amount of its liabilities, whether due or not. We think the company was insolvent, within the purview of the Insurance law.

The point finally made is, that all there was of wrong in the management and condition of the company is to be laid to the charge of the secretary of the company alone,—that all the other officers and agents of the company had acted in good faith, and were guiltless of any wrongdoing, and hence it should be taken that there was no willful default on the part of the company, and it should not be subjected to this

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proceeding. The company could act only through its officers and agents, and should be held responsible for the acts of, and mode of management by, its secretary, and the result therefrom. It is the management and condition of the company, rendering its continuance in business hazardous to the public, which entitles to this proceeding, without regard to what one or how many of the company's officers participated in the mismanagement or the bringing about of such condition. The public should have the protection which the law has provided against the unsafe doing of business by insurance companies. The hazard to the public is the same whether one or more of the company's officers were concerned in producing it, and whether or not it resulted from the willful default or misconduct of the company.

We can not say that the court below was not justified in finding from the evidence that the condition of the company was such as to render its further continuance in business hazardous to the insured therein, and to the public, and the decree will be affirmed.

Decree affirmed.

THE PENNSYLVANIA COMPANY

v.

KATE CONLAN.

Filed at Ottawa November 10, 1881.

1. EVIDENCE—NEGLIGENCE—evidence to show rate of speed and control of train. Testimony showing how far a train of cars ran after striking a person, is competent evidence in a suit against the railroad company to recover damages for causing the death of the person struck, as tending to show the train was running at a greater speed than allowed by ordinance of the city in which the accident occurred, and also that the train was not under proper control.

101	93
123	577
23a	404
101	93
130	145
31a	458
101	93
131	564
101	93
36a	422
101	93
140	62
142	568
143	449
144	664
40a	56
101	93
150	105
101	93
54a	314
57a	310
101	93
72a	392
101	93
73a	62
101	93
78a	529
101	93
181	330
101	93

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2. *SAME—employment of party injured is material.* In a suit against a railroad company to recover for the killing of a person through negligence, while engaged in his duty as a switchman, the nature of his employment at the time of the injury is material on the question whether he was exercising due care.

3. *SAME—limiting question to particular train.* In a suit against a railroad company to recover damages for striking a person by a train of cars through negligence, a witness had been speaking of the train that struck the deceased. He was then asked, "state to the jury, in your opinion, how fast the train was going," which was claimed to be objectionable, as not being limited in time or to the particular train: *Held*, that the objection was not tenable.

4. *SAME—opinions of persons as to matters not scientific, etc.* Where a copy of the rules of a railway company, showing what was required of switchmen and other servants, was admitted in evidence, and where what work the deceased switchman was required to do, as well as the means at his hand with which it could be accomplished, was distinctly shown, and where the main and side-tracks, and their distance from each other, and the street crossings and yards, with all the other facts deemed necessary, were given in evidence, it was *held* no error to refuse the testimony of other switchmen, to show that in their opinion it was not necessary for the deceased to have been where he was when he received the injury, or to have passed along the track, and that there was space enough to properly perform his duties without going upon such track, etc., as the jury were as competent, from the facts shown, as the witnesses, to form an opinion on the questions proposed.

5. As to matters which do not so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them, the opinions of witnesses, though experts, are not admissible.

6. *NEGLIGENCE—is a question of fact.* The question of negligence is not one of law, but of fact, and must be proved like any other. Hence an instruction is properly refused which tells the jury, as a matter of law, that certain facts *per se* constitute negligence. By this it is not meant that the definition of negligence is one of fact, to be determined by the jury.

7. Expressions may be found under the old practice, when this court was required to review questions of fact as well as of law, that certain facts were evidence of negligence. But such expressions are mere argument—the expression of a conclusion of fact, and not of law.

8. *PLEADING AND EVIDENCE—variance as to immaterial allegation not fatal.* As a party is not bound to prove matters which are merely surplusage, if the proof does not correspond with such matters alleged the variance is immaterial.

9. *SAME—no variance to prove more than is alleged.* In an action against a railroad company to recover for an injury by striking the deceased

101	98
88a	807

101	98
186	4559

101	98
189	*614
189	*617

101	98
204	1*278

101	98
208	*618

101	98
210	1 45

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with a moving train of cars, the declaration alleged that the deceased, at the time, was engaged in his duty in passing over and upon a certain track, "to give directions to others of his co-servants, and to aid in the switching, movement and operation of certain cars being switched upon" such track. There was evidence tending to prove this allegation: *Held*, that proof that deceased had another duty to perform, as, taking the numbers of the cars, in a memorandum book, constituted no variance, as what the deceased was doing at the time was no part of the *tort* complained of, or of the means adopted in effecting it.

10. In such case the *gist* of the action is the defendant's negligence, as alleged, and the motives of the deceased in being upon the track, or why he was there, are wholly immaterial, it being sufficient that he was lawfully there. Any allegation showing why the deceased, as switchman, was upon the track, except that he was rightfully there, is surplusage.

11. PRACTICE—*excluding all plaintiff's evidence.** A motion to exclude all of the plaintiff's evidence at its close, being in the nature of a demurrer to the evidence, is properly refused if there is any evidence tending to prove the plaintiff's case.

12. SAME—*remarks of judge.†* The court, on overruling a defendant's motion to exclude all the plaintiff's evidence, as not making a case, remarked that he would not give his reason for so deciding, for the counsel did not want him to sum up the testimony and tell the jury why he overruled the motion: *Held*, that there was no error in such remarks.

13. INSTRUCTIONS—*province of court and of the jury.* It is the office of the judge to instruct the jury in points of law, and of the jury to decide on matters of fact.

*DEMURRER TO EVIDENCE. As to the proper office of a demurrer to evidence, what it should contain, and what it admits. *Crowe v. The People*, 92 Ill. 231; *Valtes v. Ohio and Mississippi Ry. Co.* 85 id. 500; *Phillips v. Dickerson*, id. 11.

On the general subject of an involuntary non-suit, or excluding all the plaintiff's evidence from the jury, or instructing the jury to find for the plaintiff, or for the defendant. *Holmes v. Chicago and Alton R. R. Co.* 94 Ill. 440, and cases cited in note; *Caveny v. Weiller*, 90 id. 158; *Hubner v. Feige*, id. 209, and note; *Crowley v. Crowley*, 80 id. 469; *Smith v. Gillett*, 50 id. 291.

†PRACTICE—REMARKS OF THE JUDGE IN MAKING HIS RULINGS—*whether ground of error.* *Ashbaugh v. Murphy et al.* 90 Ill. 182; *Beasley v. The People*, 89 id. 571; *Skelly v. Boland*, 78 id. 438; *Andreas et al. v. Ketcham*, 77 id. 377; *Farnham v. Farnham*, 73 id. 498.

As to improper remarks of counsel. *Hennies et al. v. Vogel*, 87 Ill. 242; *Kepperly v. Ramsden*, 83 id. 354; *Wilson v. The People*, 94 id. 299.

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14. *SAME—singling out a single fact.* An instruction is properly refused which singles out an isolated fact, saying that it alone does not constitute willful or wanton negligence, especially when the question does not hinge on such fact alone, and the instruction does not assume to be predicated upon the evidence.

15. *SAME—deciding upon a question of fact.* An instruction telling the jury, as a matter of law, that an ordinary switchman's lantern, giving forth a white light, is a sufficient compliance with a city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc., is properly refused, as taking from the jury an important fact which it is their province to find from the evidence.

16. *WITNESS—credibility.* To impeach a witness it must be shown that he willfully and knowingly testified falsely to a material fact, and even then the jury are not compelled to disbelieve him as to other matters. They may do so, but should be left to exercise their judgment in that regard.

17. *PRACTICE IN SUPREME COURT—errors not urged in lower courts.* Where no objection is made that the damages are excessive, in the trial court in the motion for a new trial, nor in the Appellate Court, that question is not before this court.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action on the case, brought by appellee against appellant, in the Superior Court of Cook county, in consequence of the negligence of appellant resulting in the death of her intestate.

The declaration contains four counts: In the first, the negligent act is alleged to have consisted in wrongfully, unlawfully and negligently driving a locomotive engine and train of cars, within the limits of the city of Chicago, without having a brilliant and conspicuous light on the forward end of said train, as required by an ordinance of said city. In the second, the negligent act is alleged to have consisted in wrongfully, negligently, etc., driving the said locomotive engine and train at a greater rate of speed, within the limits of the city of Chicago, than six miles per hour, contrary to an ordinance of said city. In the third, the negligent act is

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alleged to have consisted in driving the said locomotive engine and train of cars at a high rate of speed, neglecting to ring a bell on the said locomotive, contrary to law and the ordinance of said city. In the fourth, the negligent act is alleged to have consisted in carelessly, negligently, etc., driving and managing the said locomotive engine and train, etc.

It was proved on the trial, that at the time the intestate was injured, appellant and the Chicago and Alton Railroad Company operated certain tracks in the city of Chicago, in common. The intestate was a switchman in the employ of the Chicago and Alton Railroad Company, and about half past seven o'clock on the evening of February 13, 1880, and while the intestate, together with another switchman and an engineer and fireman, were in charge of a switch-engine, gathering up empty cars from off the switches, the intestate was struck by one of appellant's freight trains, backing up along one of its main tracks, and thereby received the injuries from which he subsequently died.

Ordinances of the city of Chicago were also read in evidence upon the trial, providing that "every locomotive engine, railroad car or train of cars running in the night time on any railroad track in said city, shall have and keep, while so running, a brilliant and conspicuous light on the forward end of such locomotive engine, car, or train of cars;" also, that "no locomotive engine, railroad passenger car or freight car shall be driven, propelled or run upon or along any railroad track within said city at a greater rate of speed than six miles per hour;" and also, that the bell "of each locomotive engine shall be rung continuously while running within said city." The only light on the advancing or forward end of the train, was a common brakeman's lantern.

The other facts, so far as they may be material to an understanding of this case, will sufficiently appear in the opinion.

Brief for the Appellant.

The jury found the appellant guilty, and assessed appellee's damages at \$5000. Motion for a new trial was made, and overruled by the Superior Court, and judgment rendered upon the verdict, and thereupon appellant appealed to the Appellate Court for the First District, and that court, on final hearing, affirmed the judgment of the Superior Court. The present appeal is prosecuted from that judgment.

The errors assigned are :

First—The Appellate Court erred in not sustaining the points, and each of the points, assigned for error on appeal from said Superior Court.

Second—The said Appellate Court erred in not reversing the judgment of said Superior Court.

Third—The said Appellate Court erred in affirming the judgment of the said Superior Court.

Messrs. WILLARD & DRIGGS, for the appellant :

What the deceased was doing at the time of the alleged injury was material, and must be proved as alleged, although set forth with unnecessary particularity. *City of Bloomington v. Goodrich*, 88 Ill. 558; *Goodhue v. People*, 94 id. 37; *Chicago and Alton R. R. Co. v. Michie*, 83 id. 427; *Toledo, Wabash and Western R. R. Co. v. Beggs*, 85 id. 80.

The court erred in refusing to allow the witnesses Morrissey and Rose, experienced switchmen, to testify as to their opinions, etc. *Linn v. Sigsbee*, 67 Ill. 75; *Carter v. Bæhm*, 1 Smith's Leading Cases, 286; 1 Redfield on Railways, 579; *Beckwith v. Sydebotham*, 1 Camp. 116; *Belfountain and Indiana R. R. Co. v. Bailey*, 11 Ohio St. 333; *Cincinnati and Zanesville R. R. Co. v. Smith*, 22 id. 227; *Transportation Line v. Hope*, 5 Otto, 297; 1 Wharton on Evidence, sec. 444.

Persons not experts may give their opinions as to the value of property. *Butler v. Wehrling*, 15 Ill. 488; *McKee v. Nelson*, 4 Cow. 350; *Steamboat Clipper v. Logan*, 18 Ohio, 396.

Brief for the Appellee.

The court erred in overruling appellant's motion to exclude appellee's testimony. Such motions are in the nature of a demurrer to evidence, and should be sustained when the plaintiff's proof does not make out a case. *Fent et al. v. Toledo, Peoria and Warsaw R. R. Co.* 59 Ill. 349; *Poleman v. Johnson*, 84 id. 269; *Phillips v. Dickerson*, 85 id. 11.

The deceased could have stood between the two main tracks and performed the service in which he was engaged. He did not do so, but, on the contrary, placed himself in the most dangerous position possible under the circumstances, and the conclusion is irresistible that the proximate cause of his death was his own want of care. *Chicago, Burlington and Quincy R. R. Co. v. Hazard*, 26 Ill. 373; *Chicago and Northwestern Ry. Co. v. Sweeney*, 52 id. 325; *Chicago and Northwestern Ry. Co. v. Donohue*, 75 id. 255; *Chicago and Northwestern Ry. Co. v. Scates*, 90 id. 586; *Lake Shore and Michigan Southern Ry. Co. v. Clemens*, 5 Bradw. 77.

That defendant's instructions numbers one and two were proper and correct, counsel cited *Bartlett et al. v. Board of Education, etc.* 59 Ill. 364; *Kendall v. Brown*, 74 id. 232; *Clevinger v. Dunaway*, 84 id. 367.

That instruction number seven should have been given, see *Illinois Central R. R. Co. v. Hetherington*, 83 Ill. 510; *Chicago, Burlington and Quincy R. R. Co. v. Harwood*, 90 id. 425. The court erred in giving the instruction on its own motion.

Messrs. MONROE & LEDDY, for the appellee:

The court did allow appellant to prove what the duties of Conlan were, and how they were usually performed, as well as all the facts relating to the case, but not what Conlan might have done.

On the question whether the plaintiff used due care, or acted imprudently, it is error to admit in evidence the opinions of witnesses engaged in the same business, when no question

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of science, trade or skill is involved. *Hopkins v. Indianapolis and St. Louis R. R. Co.* 78 Ill. 32; *City of Chicago v. McGiven*, id. 347; *Chicago and Alton R. R. Co. v. Springfield and Northwestern R. R. Co.* 67 id. 142.

The court did allow appellee and appellant both to show fully the duties of Conlan, the situation of the ground, tracks, switches, trains, and the circumstances and conditions under which he performed those duties, and left it for the jury to say whether or not Conlan was negligent.

The first and second instructions were properly refused, as they took the question of negligence away from the jury, and left it with the court to say that the deceased, under a certain state of facts, was guilty of negligence. The question of the negligence of the deceased was embodied in the instructions given by the court, and fairly submitted to the jury. The case of *Bartlett v. Board of Education, etc.* 59 Ill. 364, cited by appellant, has no application.

Instructions numbers seven and eight, refused, were properly refused, the first leaving out the comparative negligence, and also being an abstract proposition of law, and the eighth infringing on the province of the jury.

The twelfth instruction was properly refused, as it was faulty in using the word "should" instead of the word "may," and omitting other words, "willfully and knowingly." *Reynolds v. Greenbaum*, 80 Ill. 416; *Pollard v. The People*, 69 id. 148.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Numerous objections are urged in argument against the rulings below, and they shall be noticed in the order in which they are discussed in appellant's brief.

First—Certain evidence, admitted over appellant's objections, it is insisted, was erroneously admitted.

1. A witness testified how far appellant's train ran after Conlan was struck. This, we think, was competent. An

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ordinance of the city limited the speed of trains to six miles an hour. It was not indispensable, in proving a violation of this ordinance, that the proof should show the speed was ascertained by actual comparison and measurement with a timepiece. That, of course, would be the very best kind of evidence, but from the nature of things it is absolutely necessary that a lower grade of evidence should be admissible. This evidence would tend to prove the speed of the train, and also whether it was under proper control, and was, in our opinion, legitimate, under the issues.

2. Again, the same witness gave answer, fixing the speed of the train, to this interrogatory: "State to the jury, in your opinion, how fast the train was going." The only respect wherein it is claimed this is objectionable is, that it is not limited in time. The objection results from a misapprehension. The witness had been previously speaking of the train that struck Conlan. The question is limited to *that* train, and, we think, must clearly have been so understood by the witness and the jury, and so was free of the objection.

3. The same witness also identified a certain memorandum book as the one Conlan was using in taking the numbers of the cars at the time he was injured. The objection urged against this evidence is, it is not alleged in the declaration that the taking of the numbers of cars was the duty of Conlan, as a switchman, and counsel say: "The allegation in each of the counts is, that it became, and was, necessary for the deceased to pass over and upon said easternmost track, 'to give directions to others of his said co-servants, and to aid and assist in the switching, movement and operation of certain cars then being switched upon the westernmost track.'" And they cite *City of Bloomington v. Goodrich*, 88 Ill. 558, *Goodhue v. People*, 94 id. 37, *Chicago and Alton R. R. Co. v. Michie, Admx.* 83 id. 427, *Toledo, Wabash and Western R. R. Co. v. Beggs*, 85 id. 80, as sustaining the proposi-

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tion that what the deceased was doing at the time was material, and must be proved, as alleged. Counsel are in error as to the effect of what is ruled in those cases. They announce, in substance, that if the pleader, though needlessly, describe *the tort, and the means adopted in effecting it*, with minuteness and particularity, and the proofs substantially vary from the statement, there will be a fatal variance,—and this was but following an old and well settled rule of common law pleading. 1 Chitty's Pleading, (7th Am. ed.) 427. But what deceased was doing at the time he received the injury, is no part of the *tort*, or of the means adopted in effecting it. And although it is alleged, in the language quoted above, there is proof tending to sustain this allegation,—that is to say, that it became, and was, necessary for the deceased to pass over and upon said easternmost track, to give directions to others of his said co-servants, and to aid and assist in the switching, movement and operation of certain cars then being switched, etc. It would be difficult to determine, upon any well established principle of law, that the fact that the deceased had an additional motive for being on the track, viz: taking the numbers of cars, would constitute a variance between the proofs and allegations.

There is, however, in our opinion, a still more complete and satisfactory answer to the objection. "A party is not bound to prove matters which are merely surplusage. If the proof does not correspond with such matters, the variance is not material." *West v. Cole*, 12 Mod. 127; *Gibbs v. Cannon*, 9 S. & R. 203; *Little v. Blint*, 16 Pick. 365; 3 Robinson's Practice, 562; 1 Chitty's Pleading, (7th Am. ed.) 262, 263.

It is distinctly averred in the declaration that the deceased was a switchman in the employ of the Chicago and Alton Railroad Company, and that in the discharge of his duties as such it became, and was, necessary to pass upon and over the track of the appellant, and that while he, in the discharge of such duty, with due care and caution, and without negli-

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gence on his part, was so passing over and along said track, etc., appellant wrongfully, negligently, etc., drove its engine and train, without having a sufficient headlight, as prescribed by ordinance of the city, etc., and thereby struck and ran against and upon the deceased, thereby wounding him, etc.

The *gist* of the action is appellant's negligence. The motives of the deceased in being upon the track are wholly immaterial, it being sufficient that he was lawfully there. Obviously no issue could be formed on the question of deceased's motives. Hence, all that is alleged in regard to why the deceased was upon the track might have been stricken out without affecting the sufficiency of the declaration. It was what appellant did, not why deceased was there, that was important to be inquired into. The allegation was entirely surplusage, and might have been disregarded, in whole or in part, without affecting the merits of the case, and it is therefore unimportant whether it was proved or not.

Second—Evidence was offered by appellant, which, on objection by appellee, was rejected by the court, consisting of the testimony of several switchmen, to show that in their opinion it was not necessary to be where deceased was when he received his fatal injury; that in order to perform the duties enumerated in the declaration it was not necessary for the deceased to pass along upon the east main track; that there was space enough to properly perform such duties without going on said track, and that there was no rule of the Chicago and Alton Railroad Company requiring the switchman performing the duties before indicated to stand on the main track. The form of the proposition is repeated under varied phraseology, but it all amounts simply to a proposition to establish that the deceased did not exercise due care, in the opinion of the witnesses, or to give the opinions of other switchmen on that subject. What the rules of the Chicago and Alton Railroad Company required of switchmen

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and other servants was proven by a copy of those rules ; and what work the deceased had to do was distinctly pointed out, as well as the means at his hand with which it could be accomplished. The main tracks and side-tracks, distances from each other, street crossings, and yards, were fully described, and all the other facts deemed necessary by the respective counsel to place the case fully and fairly before the jury, were given in evidence. Under these circumstances we can not perceive why every man on the jury was not as competent to give his opinion on the questions proposed to be proved, as a professional switchman. Whether to be on a track is dangerous, whether there is room to pass by the side of a train without getting on an adjoining track, how far tracks are from each other, how far cars project over the sides of tracks, how far, at any given point, it is necessary for a person to stand from a track in order to see the front or rear of trains, and all kindred questions, are, most obviously, as easily ascertained and testified to by one man as by another of equal intelligence, without regard to experience in railroading.

In *Linn v. Sigsbee*, '67 Ill. 75, referred to by counsel for appellant, this court held, that in an action for the breach of a contract made by one physician with another not to practice medicine within a given territory, other physicians could not be allowed to give their opinions as experts as to the amount of damages resulting to the plaintiff by the resumption of practice by the defendant. The court, among other things, said: "If they" (the physicians) "did not have a knowledge of the facts, the sickness, and the practice performed by the defendant, an opinion was a mere guess ; if they had such knowledge from a detailed statement of the facts, the jury could have assessed the damages ;" and this would seem to have equal pertinency here. If the switchmen did not know all the facts essential to an intelligent opinion, any opinion they might express would be a mere guess. If they

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did know the facts, they could detail them to the jury, so that the jury could form their own opinion.

The quotation made in that case from *Carter v. Boehm*, 1 Smith's Leading Cases, 286, we do not think applicable here, because the subject matter of inquiry is not such that only persons of skill and experience in it are capable of forming a correct judgment upon it,—or, in other words, it does not so far partake of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it. And this precise question has been thus decided by us in *Hopkins v. Ind. and St. L. R. R. Co.* 78 Ill. 32. To a like purport are also *City of Chicago v. McGiven*, 78 Ill. 347, and *Chicago and Alton R. R. Co. et al. v. Springfield and Northwestern R. R. Co.* 67 Ill. 142. Questions of value, as in *Butler v. Mehrling*, 15 Ill. 488, which are compounded of fact and opinion, are not analogous.

The questions whether deceased had been in employment long enough to know about this train, and whether his employment had been such that he saw or might have seen this train every evening, which were asked, and their answers disallowed by the court, belong to the same class as those we have commented upon, and require no further remarks. See Wharton on Evidence, vol. 1, sec. 436.

Third—Appellant's counsel, at the close of appellee's testimony, moved to exclude it from the jury, but the court refused to allow the motion.

Counsel insist that such motions are in the nature of demurrers to evidence, and should be sustained where the plaintiff's proof does not make out a case, and they cite *Fent et al. v. Toledo, Peoria and Warsaw Ry. Co.* 59 Ill. 349, *Poleman v. Johnson*, 84 id. 269, *Phillips v. Dickerson*, 85 id. 11, sustaining the proposition. Counsel are mistaken in the limitations of the rule recognized by these cases. The motion, it is true, is in the nature of a demurrer to evidence; but, as a demurrer to evidence, it was never heard

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that a judge could take the question of fact from the jury, and interpose his own judgment as to the weight and preponderance of evidence in the place of theirs. The rule, on the contrary, is, as is shown by these cases, the demurrer admits not only all that the plaintiff's testimony has proved, but all that it tends to prove,—and hence, if there is evidence tending to prove the issues in favor of the plaintiff, the judgment must be in his favor. There was evidence here tending to prove the issues in favor of appellee, and the court very properly, therefore, overruled the motion.

Fourth—The court refused certain instructions asked by appellant, of which the first, second, seventh, eighth, twelfth, thirteenth and fourteenth are specifically pointed out in argument as having been erroneously refused. The others were practically abandoned on argument, and no notice, therefore, need be taken of them.

As to the first and second, it is enough to say the court properly refused them, because they assumed to tell the jury, as matters of law, that certain facts *per se* constituted negligence on the part of the deceased. In *Great Western R. R. Co. v. Haworth et al.* 39 Ill. 353, this court ruled, "negligence is not a legal question, but is one of fact, and must be proved like any other," and this was followed in *Chicago and Alton R. R. Co. v. Pennell*, 94 Ill. 448. Of course this does not mean that the definition of negligence is one of fact, and that the jury shall be left to their own fancies to determine what, in each case, shall be the measure to which the proof shall be applied in determining whether there is negligence, but, simply, the general rule being declared as matter of law, the jury must determine whether such facts have been proved as bring the case within that general rule. Thus, in the *Haworth case*, *supra*, negligence was defined to be "the opposite of care and prudence—the omission to use the means reasonably necessary to avoid injury to others," and it was left to the jury to determine, from all the evidence,

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whether the party charged with the negligent act was thus guilty—that is, whether the party had failed to exercise care and prudence, or, in other words, omitted to use the means reasonably necessary to avoid injury to the other party. It is sometimes said that negligence is a mingled question of law and fact. Shearman & Redfield on Negligence, (2d ed.) sec. 11. If by this it is meant it is a question of law to determine the rule—that is, the definition of negligence, and a question of fact to determine, from the evidence, whether the particular case falls within the rule or definition,—it is entirely in harmony with the rulings of this court in the cases *supra*.

Expressions may frequently be found in opinions of this court, where, under our old Practice act, we were required to review questions of fact as well as of law, that such and such facts were evidence of negligence. But this is always mere argument—the expression of a conclusion of fact, not of law,—from certain other admitted or proved facts. In such cases, and as to such questions, the court is exercising precisely the same function as does a jury in the trial court, only, unlike the jury, giving its reasons for its conclusions; and it is this blending, in such cases, of the distinct and independent functions exercised by court and jury at *nisi prius*, that has occasionally misled counsel, and induced the belief that the court has declared the result of purely controverted questions of fact as conclusions of law. “It is the office of the judge to instruct the jury in points of law,—of the jury to decide on matters of fact.” Broom’s Maxims, (4th ed.) 103, *77.

The seventh instruction is faulty in singling out a single fact and saying that it, alone, does not constitute willful or wanton negligence. No one, perhaps, claims that it does. But the case did not hinge on that isolated fact, and to single it out and give it this undue prominence could have but tended to mislead the jury. Besides, it does not assume

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to be predicated upon the evidence, and if it did, it would be but the expression of an opinion of fact, and not of law. Whether such running would constitute willful or wanton negligence, would depend entirely upon the attending circumstances, all of which should be taken into consideration in order to give an intelligent answer to a question of that character.

The eighth instruction told the jury, as matter of law, in substance, that an ordinary switchman's lantern, giving forth a white light, was a sufficient compliance with the city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc. The instruction does not purport to give a legal construction of the ordinance. It simply takes from the jury a question of fact. The law said there "must be a brilliant and conspicuous light," etc., no matter how produced, and it is merely a question of fact whether there was such a light. The court, therefore, properly refused the instruction.

The twelfth instruction was properly refused. The jury are not compelled to disbelieve a witness merely because his testimony as to some material point in the case may not be true. To impeach him it must be shown that he willfully and knowingly testified falsely, and even then the jury are not compelled to disbelieve him as to other matters. They may do so, but should exercise their judgment in that regard. *Reynolds v. Greenbaum*, 80 Ill. 416; *Pollard v. The People*, 69 id. 148.

The substance of the thirteenth instruction is clearly and distinctly embodied in the instructions given by the court, and so its refusal could have done no harm.

The fourteenth instruction was also properly refused. The nature of the employment of deceased at the time he was injured, was material on the question of whether he was exercising due care, and the purport of the instruction was to assert the contrary. The court gave to the jury a charge,

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of its own motion, embodying with substantial accuracy all the principles of the law we think essential to a full comprehension of their duties, by the jury.

The objections urged are, in our opinion, hypercritical, for the most part, and all untenable. They are not of sufficient practical importance, in our opinion, to justify stating and answering them *seriatim* and at length, and we shall therefore forbear further comment.

An objection is made to a remark of the judge in overruling appellant's motion to exclude appellee's testimony, to the effect that he would not give his reasons for deciding as he did, for the counsel did not want him to sum up the testimony and tell the jury why he overruled the motion. It is impossible to conceive that this improperly affected the jury. The motion was overruled, and from this the jury must have inferred it was not well founded, and we are unable to perceive that anything more prejudicial to appellant could have been inferred from these remarks of the judge. We regard the objection as frivolous.

There seems to have been an objection urged in the Superior Court in regard to the competency of a jurymen, but since it is not pressed in argument here, we infer it has been abandoned, and, we think, very properly so, as it was plainly destitute of merit.

The question of whether the damages are to be regarded as excessive, is not before us, since that objection was not raised in the motion for a new trial in the Superior Court, nor assigned for error in the Appellate Court. *Emory v. Addis*, 71 Ill. 273; *Thayer v. Peck*, 93 id. 357; *Diversey v. Johnson*, Admz. id. 547; *Page et al. v. People ex rel.* 99 id. 418; *Litchtenstadt v. Rose*, 98 id. 643.

The judgment is affirmed.

Judgment affirmed.

MARSHALL FIELD *et al.*

v.

LAVINIA A. HERRICK *et al.**Filed at Ottawa November 10, 1881.*

1. *GUARDIAN—leasing wards' land—approval by probate court.* A lease of property by a widow in her own right, and as guardian for her minor children, can not be avoided by the lessee for want of its approval by the probate court. A lease executed by a guardian in behalf of his wards for a term not exceeding their majority, is valid, unless disapproved by the probate court. The approval of that court is not essential to the validity of the lease.

2. *LANDLORD AND TENANT—prior tenant holding over*—rights of the parties to the second lease.* A lessee can not have his lease set aside and be released from his covenants to pay rent, from the mere fact that a prior tenant, whose term has expired, holds over, without right. The lessee, having the right of possession, should take legal steps to obtain possession against such prior tenant.

3. *SAME—prior tenant in possession—acceptance of rent by landlord from second lessee.* Where the assignee of a lease makes an arrangement with a prior lessee holding over without right, dismissing a suit for possession, whereby the prior lessee is to pay the same rent the lessee was to pay, the payment of such rent for several months by such prior tenant to the agent of the lessor, and its acceptance by him as payment of rent under the last lease, is no cause for setting aside such last lease and discharging the last lessee from his covenants to pay rent.

4. *LEASE BY AN INFANT—who may avoid it.* A lease executed by a minor is not void, but only voidable at his election, and the lessee can not set up the disability of the lessor to defeat the lease or be relieved from its covenants.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. JOHN H. THOMPSON, for the appellants:

1. Mr. Myers, the agent, agreed with appellants to obtain the approval of the probate court to the lease, which was not done, and hence the lease was not operative and binding.

* As to the character and extent of the liability of a tenant holding over, see *Clinton Wire Cloth Co. v. Gardner et al.* 99 Ill. 151.

101	110
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112a	*197

Brief for the Appellees.

2. Appellants, or their assignees, Hagedon & Boyle, were unable to obtain possession from a prior tenant of the appellees. It was not possible for Hagedon & Boyle to have succeeded in their suit, for the lease they held was not approved by the probate court, and the guardian had no authority to lease except with such approval. Rev. Stat. chap. 64, sec. 23; *Miller v. Benner, Guardian*, 69 Ill. 108.

That when a lessee is prevented from the beneficial enjoyment of his lease by the acts of his landlord, he is entitled to treat the lease as at an end, as these lessors did, can not be doubted. *Berrington v. Casey*, 78 Ill. 317.

3. When a tenant is substituted in place of the original lessee, and takes possession and pays rent, this operates as a discharge of the original lessee from all liability on the lease. Such an agreement may be inferred from the conduct of the parties. *Taylor on Landlord and Tenant*, secs. 314, 315; *Fry v. Partridge*, 73 Ill. 51; *Stobie et al. v. Dills*, 62 id. 432; *Amory v. Kannoffsky*, 117 Mass. 351; *Bedford v. Terhune*, 30 N. Y. 457; *Smith v. Niver et al.* 2 Barb. 180; *Thomas v. Cook*, 2 B. & Ald. 119; *Walker v. Richardson*, 2 M. & W. 882; *Dills v. Stobie et al.* 81 Ill. 202.

Mr. JOHN V. LE MOYNE, for the appellees:

1. There is nothing in the lease making the promise to pay the rent conditional, and it contains no stipulation that the lessors would obtain the approval of the court. If there had been any agreement made prior to the making of the lease, it was merged in the writing, and can not now be insisted upon to defeat the lease.

2. As to the second point, that the appellants or their assignees were unable to obtain possession, we say the lessors were only required to give the *right* of possession. The tenant alone can maintain an action for possession. *Gazzolo v. Chambers*, 73 Ill. 75.

Opinion of the Court.

3. The lessors did not accept Cox as their tenant, but refused to make any arrangement with him and release appellants.

4. A lease made by a guardian, extending beyond the minority of his ward, was once considered void; but the modern rule treats such leases as void only for the excess, at the election of the ward. Schouler on Domestic Relations, p. 471; Bacon Abr., Leases, 1; 2 Kent's Com. 228; 1 Washburne on Real Property, 307; *Rex v. Oakley*, 10 East, 494; *Putnam v. Ritchie*, 6 Paige, 390; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Hedges v. Riker*, 5 id. 163; *Richardson v. Richardson*, 49 Miss. 29.

5. The lease was certainly not void, but, at most, voidable, and even if voidable at the option of appellants, because not approved, as they did not exercise such option before the lease was approved by the court they could not exercise it afterward.

MR. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Marshall Field and Levi Z. Leiter, against Lavinia A. Herrick, Anna M. Herrick, Elijah W. Herrick, and Sarah L. Herrick, to cancel a lease executed February 2, 1878, by the defendants, by the terms of which certain premises in the city of Chicago were leased to Field & Leiter, from the 1st day of March, 1878, to the 29th day of February, 1880. The bill prayed that the lease may be decreed to be at an end, and complainants may be decreed to be released and discharged from the covenants of the lease, and defendants may be enjoined from prosecuting any suit against the complainants on any covenant of the lease. The defendants put in an answer to the bill, a replication was filed, and a hearing had upon the evidence, which resulted in a decree dismissing the bill, which decree was affirmed in the Appellate Court.

Opinion of the Court.

The property embraced in the lease was owned by defendants, the widow and children of Elijah W. Herrick, deceased. The widow, Lavinia A. Herrick, had a dower interest in the property, and the fee was owned by Ann M., Elijah W., and Sarah L. Herrick, who were minors, Lavinia A. Herrick being their guardian. E. B. Myers acted as agent of the defendants in leasing the property.

It is first urged that there was an agreement on the part of appellees to have the lease approved by the probate court, which was not complied with. There is some evidence in the record that appellees agreed to have the lease approved by the probate court, but the decided preponderance of the evidence is the other way. Myers testified that during the negotiation for the lease he notified the parties that it could not be made for two years. His evidence on this point is as follows: "I said, I can not make a lease for two years, as one of the children will arrive at her majority about the first of June. I will make you a lease for Mrs. Herrick's interest and the two children for two years, and I will make you a short lease for the other child until June, when she will, undoubtedly, ratify the arrangement. Somebody, I think Borden, said that will be all right; you make the lease, and let that young Miss sign it, and we will take the chances. He said, of course you can not get the lease approved by the county court beyond the majority of the children." Borden was acting for complainants, and after the terms and conditions of the lease had been agreed upon, Myers says Borden walked over to his store and dictated the lease. It was signed by Anna Herrick, as Borden had requested. Again, the fact that the lease contains no provision that the lessees shall have it approved, in connection with the further fact that complainants accepted the lease and took and retained it in their possession without a word of objection that it was not approved, would seem to repel the presumption that appellees had agreed to have it approved.

Opinion of the Court.

It is next urged, that if the complainants, or their assignees, were unable to obtain possession of the premises on account of the invalidity of the lease, or the claim which Cox had acquired to the premises through the defendants, complainants were warranted in treating the lease as at an end, and are entitled to have it cancelled. It appears from the evidence that two leases were executed by the parties, the second one, however, to take the place of the first. The two differed only in this: the first was signed by Lavinia A. Herrick in her own right, and as guardian of Elijah W. and Sarah L. Herrick, minors, and the second lease was signed by Lavinia A. Herrick in her own right, and as guardian of Anna M., Elijah W. and Sarah L. Herrick, minors. Anna M. Herrick signed both leases in person. The lease was not approved by the probate court until August 20, 1878. Was it void for the reason that it was not approved? We think not. The lease was executed by Lavinia A. Herrick in her own right, and as to her interest there can be no doubt in regard to the validity of the instrument. Anna M. Herrick executed the lease in person. This she had the right to do, and as to her interest it was only voidable at her election; and as she never disaffirmed the act, the complainants in the bill can not set up her disability to defeat the lease. In regard to the other two owners of the premises, Elijah W. and Sarah L. Herrick, the lease was executed by their guardian. There can be no doubt in regard to the right of a guardian to lease the real estate of the ward,—it is not only the right, but the duty of the guardian to do so.

But is a lease made by a guardian void unless it is approved by the probate court? We do not think such a lease can be held void. Sec. 23, chap. 64, Rev. Stat. 1874, p. 561, declares that the guardian may lease the real estate of the ward upon such terms and for such length of time, not exceeding beyond the majority of the ward, as the county court shall

Opinion of the Court.

approve. All that can reasonably be claimed under this statute is that a lease made by a guardian may, when it is submitted to the probate court, be rejected and set aside by the court. Such a lease is not, however, void, but voidable merely,—it may be regarded as binding until the court should examine it and refuse approval.

It is, however, claimed, that Cox was in the possession of the premises as a tenant under a valid agreement with the defendants, and complainants had a right to treat the lease as cancelled, for the reason they could not obtain possession. This position is not sustained by the proof. It is true that Cox was in the possession of the premises and refused to surrender up the possession to complainants, but the evidence shows that his term had expired, and he was holding over without right. He went into possession under a written lease for a certain time, ending January 1, 1878. The lease contained a provision that he should deliver up the possession upon the expiration of his term, without notice. He claims that he had an agreement or understanding with Myers that he should have a lease for another year. Myers expressly denies that he ever made any such agreement, but even if he did, Cox could not hold possession upon a verbal agreement to execute a lease in the future; and this is all that can be claimed for the arrangement. If, however, there was any doubt upon this question, why was it that Hagedon & Boyle, to whom complainants assigned the lease, failed to prosecute the suit brought to recover possession, to final judgment? Under the lease the right of possession was in them, and had they prosecuted the action to final judgment, and been defeated by a prior lease set up by Cox, then they might have claimed, with much reason, that this lease was at an end. But this they failed to do. After having brought a suit they abandoned it, and dismissed their action.

But it is said that after an action had been brought to recover possession of the premises the defendants accepted

Opinion of the Court.

Cox as a tenant, and thus terminated the lease in question. This is a question of fact, to be determined from the evidence. It is not claimed that any new lease was made, or the lease to Field & Leiter surrendered or cancelled. Whatever was done rested entirely in parol. Nor do complainants contend that the defendants in person said or did anything in regard to the transaction. Whatever was done by defendants was done by Myers, acting as their agent. He testified, that "after the execution of the lease to Field & Leiter no agreement of any kind or nature was made by me or anybody for the Herrick estate, to my knowledge, that Cox should remain on the premises. * * * Asa wanted to let Cox remain in possession and pay the rent, which I declined, time and again." We think it is apparent from the evidence that an arrangement of some character was made between the attorney of Cox and the attorneys of Hagedon & Boyle, by which Cox should remain in the possession of the premises and pay the same rent which Field & Leiter had agreed to pay, and that the rent was actually paid for several months; but we do not think the evidence sufficiently connects Myers with the arrangement further than he received the rent, claiming that he received it under the lease to Field & Leiter.

In conclusion, we are of opinion that the evidence fails to show any ground whatever for equitable relief.

The decision of the Appellate Court will be affirmed.

Decree affirmed.

Syllabus.

PERCIVAL P. OLDERSHAW *et al.*

v.

STEPHEN S. KNOWLES.

Filed at Ottawa November 10, 1881.

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1. EVIDENCE—on cross-examination—as to character of transaction between commission merchant and his customer—on margins. In a suit by a commission merchant or broker to recover of a person for whom a purchase was made, for loss on a re-sale, for want of putting up of a further margin, the defendant will have the right, on cross-examination, to inquire when, where, and in what manner the purchase was made for him, and whether the plaintiff has settled the purchase, and if so, what was paid, to whom, and the manner it was paid, to show whether the mode of dealing was fair, and free from fraud and injustice or wrong to him.

2. A commission merchant has no right to adopt methods in making purchases for his customers that he may refuse to explain, or that are so intricate or tortuous that they are incapable of being explained to the full comprehension of an ordinarily intelligent jury.

3. In a suit where the plaintiff claims that he made a contract for lard for the defendant, for future delivery, and that in consequence of the defendant's failure to indemnify him against loss he was compelled to sell the lard, and pay the loss to the person from whom the purchase was made, and that he has paid and settled the loss, and has the right to recover the same of the defendant, the latter will have the right to learn the particulars of the entire transaction, on the trial.

4. PRACTICE IN THE SUPREME COURT—*what may be assigned as error.* On appeal from the last judgment of the Appellate Court in a case, this court cannot consider the propriety of the admission of evidence on a second trial in the lower court, under the prior ruling of the Appellate Court when the case was first before it.

5. ERROR WILL NOT ALWAYS REVERSE—as to admission of evidence. The admission of evidence technically inadmissible, to prove a fact already proven beyond dispute by unobjectionable proof, the improper evidence not being calculated to mislead the jury, affords no ground for a reversal.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the HON. ELLIOTT ANTHONY, Judge, presiding.

Opinion of the Court.

MESSRS. NEEDHAM & MILLER, for the appellants.

MR. A. B. JENKS, for the appellee.

MR. JUSTICE WALKER delivered the opinion of the Court:

It appears that appellants were commission merchants or brokers, and members of the board of trade in Chicago. As such they purchased, at the instance of appellee, in the month of February, 1877, for April delivery, a quantity of lard, at a specified price. Appellee's name was not known in the transaction, but he placed in the hands of appellants a sum of money as a margin. After the purchase, and on the 20th of that month, there was a heavy decline in the price of lard, leaving a difference between the price on that day and the contract price, of over \$2000. Appellants called on appellee for \$2000, to protect them on the contract. On the evening of that day, Culbertson, a member of appellants' firm, called on appellee, and notified him that unless he put up the money they would sell the lard. It was then agreed that appellee should go home to Jacksonville that night, to see if he could raise the money to make his margins good, and if he succeeded he was to return with it the next day. To this point there is no dispute as to the facts.

Appellants contend that it was further agreed, that if appellee succeeded in procuring the money, he was to telegraph appellants, and they would not sell him out, but would await his return. But appellee claims the agreement was, that he should return to Jacksonville, and if he obtained the money, and returned with it the next day, they would hold it, and would not sell. He went to Jacksonville, obtained the money, and returned to Chicago, reaching there at five o'clock on the afternoon of the 21st, with the money; but before his arrival they had sold, as they claim, at a loss of \$2400 on the contract; and deducting from that sum the \$700 which appellee had deposited with appellants as a mar-

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gin, and adding their commissions, they claim there is due to them \$1858.10, for the recovery of which they sued him in assumpsit.

Appellee filed a plea of set-off, claiming that by the sale of the lard, not only without authority but against instructions, appellants had no right to recover anything, but, on the contrary, he was entitled to recover back the \$700 he had deposited with them. On a trial in the Superior Court of Cook county the jury rendered a verdict against plaintiffs, and in favor of defendant, for \$700, and plaintiffs appealed to the Appellate Court for the First District. On a hearing in that court the judgment of the Superior Court was affirmed, and they bring the record to this court, and assign errors.

The jury having found the facts in favor of appellee, and the Appellate Court having, by affirming the judgment, found them the same way, we are precluded by the statute from considering them, further than they are important in discussing questions of law arising upon them.

It is first insisted that the Superior Court erred in permitting appellee's counsel, on cross-examination, to examine Culbertson as to the manner of settling the identical or original contracts for this lard, by the usage of the board of trade. It is insisted that appellee had no interest in the contract made upon his order, and for that reason it was improper to inquire into that matter, and that it was intricate, and its investigation tended to confuse and prejudice the jury. There can be no question that when appellants are claiming to recover money from appellee, as having been paid by them on a contract they claim to have made for him at his request, he has a right to know when, where, and with whom it was made; and he has the further right to know if they have paid or settled it, and if so, what was paid, to whom, and the manner in which it was paid. He has a right to know, and have the jury to know, whether the mode of dealing adopted by appellants was fair, and free from all fraud, injustice or

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wrong to him. They have no right to adopt methods in making purchases for their customers that they can refuse to explain, or that are so intricate or tortuous that they are incapable of being explained to the full comprehension of ordinarily intelligent men. They can not fall back behind methods that will not bear scrutiny, or which are too complicated to be understood by men of ordinary intelligence and business capacity. Appellants claim that they made the contract for appellee; that he failed to indemnify them; that they were therefore compelled to sell the lard, and pay the loss to the person from whom they purchased, and that they have paid or settled the loss, and have the right to recover the amount from appellee. To learn the particulars of the entire transaction we are of opinion that the examination was proper, and the court committed no error in permitting it.

This fully answers the objection, that as the Appellate Court had held such an examination, when the case was previously before it, immaterial and improper, it was therefore error in the Superior Court to permit the examination. Be that as it may, we have nothing before us but the last judgment of the Appellate Court. It is from that judgment plaintiffs appeal to this court, and which they seek to reverse. The previous judgment of that court is not before us, and we have no power to examine or review it. There is no force in this objection.

It is next insisted that the Superior Court erred in permitting appellee's pass-book to be read in evidence, showing he had \$2000 deposited in the Stock Yards Bank to his credit, as tending to show he had returned to Chicago on the 21st of February, with that amount ready to put up, according to agreement, as a further margin on the purchase of the lard. We deem it unnecessary to determine whether this evidence was, or was not, strictly proper, because there is an abundance of evidence, independent and outside of that evidence,

Syllabus.

to prove, beyond a reasonable doubt, that appellee did have the money in Chicago on the afternoon of the 21st of February. The pass-book only corroborated the other evidence. To reverse for the admission of improper evidence, we must be able to see that it may have worked injury to the party objecting. We are unable to see that it could have misled the jury, and for that reason a reversal can not be had on that ground, even if it was not admissible. To entitle a party to a reversal he must show error that has, or presumably has, worked him an injury. Appellants have failed to show such error in this record, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

WILLIAM TOBIN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa November 10, 1881.

1. **INSTRUCTIONS**—*failure to mark as "given."* A judgment of conviction in a criminal case will not be reversed merely because the court failed to mark two of the defendant's instructions as "given," where the record shows they were given to the jury as asked.

2. **NEW TRIAL**—*for newly discovered evidence.* A new trial will not be granted on the ground of newly discovered evidence, where it does not appear but the evidence might have been had on the trial by the exercise of reasonable diligence, nor where such evidence is in its nature impeaching, only.

3. **SAME**—*absence of witness by sickness.* A new trial will not be granted in a criminal case because an important witness was prevented from attending the trial by sickness, and the prisoner's counsel failed to bring such fact to the notice of the court. The party in such case should have asked for a continuance.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

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Briefs of Counsel.

Messrs. HOLDEN & TERHUNE, for the plaintiff in error:

The law intends that every one shall have a fair trial. If, by any misfortune or accident, without any fault on his part, a party has been unable to present the merits of his case before the jury, the court should allow him another hearing. *Schlencker v. Risley*, 3 Scam. 483.

It was error, and calculated to mislead the jury, for the court to give two of defendant's important instructions without marking them as given. Rev. Stat. 1874, chap. 110, sec. 54; *Kepperly v. Ramsden*, 83 Ill. 354; *Calef v. Thomas*, 81 id. 478.

The affidavits of newly discovered evidence were sufficient, and the court ought to have granted a new trial.

Mr. LUTHER LAFLIN MILLS, State's Attorney of Cook county, and Mr. GEORGE C. INGHAM, Assistant State's Attorney, for the People:

It is the settled law in this State, that a judgment will not be reversed simply because the instructions were not marked, if the record shows what was done with them. *Cook v. Hunt*, 24 Ill. 550; *McKinzie v. Remington*, 79 id. 390.

To be adequate in support of the motion, these affidavits must set forth evidence discovered since the trial, and it must appear that such evidence could not have been discovered, by reasonable diligence, before the trial. 1 Bishop's Crim. Proc. sec. 1279.

The affidavit should have negatived every circumstance from which negligence may be inferred. *Crozier v. Cooper*, 14 Ill. 139; *Wright v. Gould*, 73 id. 57.

Newly discovered evidence, which in its nature is impeaching, will not authorize the granting of a new trial. 1 Bishop's Crim. Proc. sec. 1279; 80 Ill. 388; 69 id. 355; *Higgins v. People*, 98 id. 520.

Opinion of the Court.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

At the April term, 1881, of the Criminal Court of Cook county, William Tobin was convicted of the crime of robbery, and sentenced to imprisonment in the penitentiary for the term of one year. This court is asked to reverse the judgment of the court below, for two reasons:

First—Because two of the instructions asked by the defendant were not marked “given,” or “refused,” by the presiding judge.

The statute provision is: “And when instructions are asked which the judge can not give, he shall, on the margin thereof, write the word ‘refused,’ and such as he approves he shall write, on the margin thereof, the word ‘given.’” The record shows that both instructions were given to the jury as asked.

We do not perceive that any harm resulted to the defendant from the instructions not being marked “given.” In *Cook v. Hunt*, 24 Ill. 550, we said this statute was directory to the court, and should be obeyed, but that a judgment should not be reversed simply because the instructions were not marked “given,” if the record shows that they were in fact given; and see *McKenzie v. Remington*, 79 Ill. 388. *Calef v. Thomas*, 81 Ill. 478, and *Kepperly v. Ramsden*, 83 id. 354, in nowise militate against those decisions, as is contended by plaintiff in error. We do not consider, as is urged, that the marking of some of the instructions for the defendant “given,” and the failure to so mark the two instructions in question, was such an omission as to mislead the jury, to the prejudice of the defendant, and require a reversal of the judgment.

Second—It is urged that the court below erred in overruling the motion for a new trial, based upon certain affidavits submitted to the court, of newly discovered evidence. These were the affidavits of Ryan, the proprietor of the bar-room in which the robbery occurred; of Nelson, his assistant bar-

Mr. Justice DICKEY, dissenting.

keeper, and of one Roche, that they were all present in the bar-room at the time of the robbery, and that the defendant was not then present in the room.

Defendant sets out in his own affidavit which he made, that he had expected to have present at the trial, Ryan, to testify in his behalf, but that Ryan was, on the day of trial, confined to his bed by sickness; that that fact was communicated to defendant's counsel, but they failed to bring it to the notice of the court, or to apply for a continuance of the cause. If Ryan was a material witness for defendant, and unable to attend the trial from sickness, application should have been made to the court for a continuance of the cause. Having voluntarily gone to trial without such application for a continuance, and an adverse verdict having been rendered, the absence of the testimony of Ryan can not be made the ground for a new trial. As to Nelson and Roche, it does not appear but that their evidence might have been had at the trial by the exercise of reasonable diligence. The affidavits of Mary Tobin and Kitty Devitte were to the effect that after the trial they had an interview with Young, the prosecuting witness, who testified on the trial that defendant robbed him, and that in such interview Young admitted that it was not defendant who robbed him. This is in the nature of impeaching evidence. Newly discovered evidence, which is in its nature impeaching, will not authorize the granting of a new trial. *Martin v. Ehrenfels*, 24 Ill. 187; *Kendall v. Limberg*, 69 id. 356; *Knickerbocker Ins. Co. v. Gould*, 80 id. 388.

Finding no cause for reversing the judgment, it is affirmed.

Judgment affirmed.

MR. JUSTICE DICKEY: The affidavits presented on the motion for a new trial, taken with the proofs on the trial, convince me that Tobin was not present when the robbery was committed, and really had no connection with the offence. The robbery occurred in a drinking room connected with a

Mr. Justice DICKEY, dissenting.

dancing hall, about midnight, when some sixty persons were present, amid much confusion and considerable drunkenness.

The only testimony at the trial tending to show that Tobin was present when Young was robbed of his watch, was that of Young and one King. This testimony shows that King is a confessed thief, and that at the time of the robbery he and Young had been drinking very freely, and that the doors of the room were closed instantly, for the purpose of searching each person in the room. The testimony of Kennedy, given on the trial, is, that he witnessed the scuffle in which the robbery occurred, and did not see Tobin there. Annie Stark and Minnie Duly swear, that when the doors were closed Tobin was not in the room where the robbery occurred, but had been in the dancing hall, and was then on his way escorting one of these girls towards that room, and by the closing of the doors was shut out. Tobin's affidavit shows the same thing, and that he entered the room with the police officers, when the door was opened for the officers. The affidavit of Ryan, the proprietor of the bar-room, and that of Nelson, his assistant bar-keeper, and that of John Roche, who were all in the bar-room when the scuffle and robbery occurred, and when the doors were closed, all agree in saying Tobin was not there. The affidavits of Kitty Devitte, Mary Tobin, and of the accused, show that Young, after the trial, said he had become satisfied that Tobin was not engaged in the robbery, and that he had ascertained who the real thieves were.

Being convinced that Tobin is not guilty, I do not think that any arbitrary rule as to newly discovered evidence should bind the court, so as to require a man to be sentenced to the penitentiary who so plainly seems to be innocent.

Syllabus. Brief for the Plaintiff in Error.

CHARLES W. WRIGHT

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa November 10, 1881.

1. INTOXICATING LIQUORS—*sale by druggists without license, prohibited.* The sale of intoxicating liquor in less quantity than one gallon, by a regular druggist, even if it be in good faith for medical purposes, without a license or permit to do so from the proper municipal authorities, is prohibited by our statute, and any druggist or other tradesman, though not the keeper of a dram-shop or tippling house, who shall so sell the same without license, is liable to indictment, though the liquor is bought and sold, and in fact used, solely for medicinal purposes.

2. STATUTE—*rule of construction.* In construing a new statute on any subject, it is proper to consider it with reference to the state of the law before its adoption, and the previous legislation on the same subject.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Stark county; the Hon. D. McCULLOCH, Judge, presiding.

Mr. M. SHELLNBARGER, for the plaintiff in error, in quite a lengthy and exhaustive argument, made among others the following points:

Section 1 of the Dram-shop act, while sweeping in its terms, making no exceptions in favor of any persons or class of persons, was not intended to apply to a sale made by a druggist in good faith for medical and domestic purposes.

Mr. Dwarris says, in his Fifth Maxim: "When statutes are made, there are some things which are excepted and foreprized out of the provisions thereof by the law of reason, though not expressly mentioned; thus, things for necessity's sake, or to prohibit a failure of justice, are excepted out of statutes." Dwarris on Statutes, 123. See, also, Vattel on Rules of Int. 128-130; Dwarris on Statutes, 144, 145; Hart

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Brief for the People.

v. *Kleis*, 8 Johns. 44; *McCarter v. Orphan Asylum*, 9 Cow. 437; *Leavitt v. Blatchford*, 5 Barb. 13; *People v. New York Central R. R. Co.* 13 N. Y. 81; *Holmes v. Corby*, 31 Barb. 289; *Commonwealth v. Kimball*, 24 Pick. 370; *Pearce v. Atwood*, 13 Mass. 343.

As to further instances of a construction to avoid a wrong, or particular hardship, or to prevent an absurd consequence, and to promote right, see *People v. Utica Ins. Co.* 15 Johns. 358; 1 Kent's Com. 462; *Bryan v. Buckmaster*, Breese, 408; 3 Scam. 160; *Zarresseller v. People*, 17 Ill. 101; *Burgett v. Burgett*, 1 Ohio, 221.

It can not be supposed the legislature intended to make it criminal, and punishable by fine and imprisonment, for a regular druggist to fill a physician's prescription, or even sell without license, when necessary to save life, or in other extreme cases, and yet the statute makes no express exceptions. Other courts have, by construction, supplied exceptions in proper cases. See *Dowell v. State*, 2 Ind. 658; *Thomason v. State*, 15 id. 449; *Haber v. State*, 19 id. 457; *Jakes v. State*, 42 id. 473; *Ball v. State*, 50 id. 595; *State v. Wray*, 72 N. C. 253; *Hooper v. State*, 56 Ind. 153.

Mr. B. F. THOMPSON, State's Attorney, for the People:

1. Where the terms of the statute are general, and no exceptions are made for medicinal purposes, no necessity of the purchaser to use the liquor, even if prescribed by a physician as an indispensable medicine, and there is no person in the county with authority to sell, will protect the vendor. *Commonwealth v. Sloan*, 4 Cush. 52; *Commonwealth v. Kimball*, 24 Pick. 366.

2. Unless there be an express exception in the statute, the fact that the liquor was sold for a medicine is no defence. *Phillips v. State*, 2 Yerger, 358; *State v. Whitney*, 15 Verm. 298; *State v. Chandler*, 15 id. 425; *State v. Brown*, 31 Maine, 522; *State v. Hall*, 39 id. 107.

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3. The Indiana courts, it is true, hold that a druggist may, upon a proper occasion, *bona fide* and with due caution, retail liquors to be used merely as a medicine. But the courts of that State also hold that the prosecutor must prove that the defendant had no license (*Sheaver v. State*, 7 Blackf. 99); that the defendant is not responsible for sale to a minor, if the minor looked like, or represented himself to be, an adult, or his family, or the community, treated him as of age (*State v. Kalb*, 14 Ind. 403); that the principal is not responsible for the sales made by his clerk, without his knowledge or consent (*Lathrop v. State*, 51 Ind. 192), and many other like opinions upon the "liquor question," which are contrary to the decisions of this court, and inconsistent with the spirit and policy of the laws of this State.

4. As to rule of construction, see *Way v. Way*, 64 Ill. 406; *Potter's Dwarrior on Statutes*, 188; *Biggs v. Clapp*, 74 Ill. 335; *Scott v. Reed*, 10 Pet. 524. And as particularly applicable to the construction of our statute forbidding the sale of liquor without license, *Bishop on Stat. Crimes*, sec. 1019; *State v. Wray*, 72 N. C. 253; *State v. Larrimore*, 19 Mo. 391; *State v. Gummer*, 22 Wis. 442; *State v. Downer*, 21 id. 274.

5. And if the sale is made in good faith for lawful purposes, the burden of proof is on the defendant to show that fact. *Gunnarsshon v. City of Sterling*, 92 Ill. 569; *Harbaugh v. City of Monmouth*, 74 id. 356; *State v. Wray*, 72 N. C. 253; *State v. Wray*, 1 Am. Cr. R. 480.

MR. JUSTICE MULKEY delivered the opinion of the Court:

Charles W. Wright was convicted at the March term, 1879, of the Stark county circuit court, for the selling of intoxicating liquors without a license, and on error to the Appellate Court for the Second District that conviction was affirmed. Thereupon the plaintiff sued out the present writ of error, and the case is now here for review.

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Plaintiff in error admits the selling of intoxicating liquors without a license, but insists that under the circumstances he incurred no criminal liability in doing so. The evidence shows that at the time of the sales for which the indictment was preferred, plaintiff in error was a regular druggist, doing business in Toulon, Stark county, and we think the weight of evidence clearly establishes the fact that these sales were made by him as such druggist without any intention of violating the Criminal Code, and that the liquors so sold by him were in good faith bought, sold and used for medical purposes only; and the question presented for our determination in this case is, do these facts constitute a defence to the indictment.

The answer to this question depends upon the construction which must be given to sec. 2 of chap. 43, of the Revised Statutes, entitled "Dram-shops," the title of the act being, "An act to provide for the licensing of, and against the evils arising from, the sale of intoxicating liquors." The first section defines a dram-shop to be "a place where spirituous, vinous or malt liquors are retailed in less quantity than one gallon," and declares that "intoxicating liquors shall be deemed to include all such liquors, within the meaning of the act." The second section then provides: "Whoever, not having a license to keep a dram-shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquors in any quantity less than one gallon, or in any quantity to be drunk on the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than \$20 nor more than \$100, or imprisoned in the county jail not less than ten nor more than twenty days, or both, in the discretion of the court."

It is conceded by counsel that the sales of intoxicating liquors proven against the accused fall within the letter of this section, and that if it is to be enforced according to the

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literal import of the terms used, the accused was properly convicted; but it is earnestly, and with much force of reasoning, contended, that notwithstanding the comprehensive and sweeping terms of this section it was only intended to apply where intoxicating liquors are sold as a beverage,—or in other words, it is claimed that in the construction of the section, an exception is to be understood or supplied which will exclude from its operation all sales made in good faith by druggists or other tradesmen, in the regular course of business, for purely medical, mechanical, or other like purposes. That such exceptions are sometimes implied and given effect in the construction of statutes, even where the language is clear and unambiguous, as in the present case, is not to be denied; but this latitude of construction is never permissible except where, in order to avoid imputing to the legislature highly improbable or absurd purposes, it must be presumed that such construction was intended.

The whole controversy, therefore, in the present case, resolves itself into this: Did the legislature intend that an exception of the kind we have just stated is to be understood and supplied in construing and giving effect to the section in question? That there is no express declaration of such intention, either in the section itself, or in other parts of the act, is not pretended; hence, if it exists at all, it must be deduced either from matters apparent upon the face of the act, or from extrinsic considerations, or in part from both. Although counsel for plaintiff in error has favored the court with a very elaborate and able argument, devoted almost exclusively to this question, yet he nowhere in it claims there is anything upon the face of the act indicating such intention, and we may, therefore, fairly presume nothing of the kind exists, otherwise he would have directed the attention of the court to it. We have, however, with a view of ascertaining for ourselves, carefully examined the various provisions of the act, and from such examination have no hesitancy in saying

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nothing can be found in it evidencing such intention. On the contrary, we find in the enumeration contained in the seventh section of the act, of the places where liquors are sold in violation of the provisions of the second section, drug stores,—not mere pretended drug stores, as counsel would have it,—are specifically mentioned, and all such places are expressly declared to be nuisances. This clearly shows that druggists, as a class of dealers, were not inadvertently overlooked by the legislature, but, on the contrary, were in the legislative mind at the very time of the adoption of the act, and the seventh section expressly denounces a penalty against them, as possible violators of its provisions.

If, then, the legislature intended, as is claimed, the act should not apply to sales made by druggists for medicinal or other like purposes, it was certainly a very opportune time, when declaring their establishments nuisances for selling liquors in contravention of the act, to have expressly declared that its provisions were not intended to extend to that class of cases, and the very fact that no such declaration was made, under the circumstances stated, we regard as evidence strongly tending to show that nothing of the kind was intended.

It is universally conceded that one of the most efficient means in ascertaining the legislative intent in the adoption of a new statute is to consider it with reference to the state of the law before its adoption, and particularly with reference to the previous legislation on the same subject. A passing notice, therefore, of some of the previous legislation with respect to the granting of licenses for the sale of intoxicating liquors, may aid us somewhat in our present inquiries.

It will not be necessary to go back further than the act of 1845. This act contained an absolute prohibition against the sale of intoxicating liquors in a less quantity than one quart, without a license. Like the present statute, it contained no saving clause with respect to druggists. (Sec. 132,

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Rev. Stat. 1845.) In 1851, the legislature passed an act popularly known at that time as the "quart law," abolishing the license system altogether, and prohibiting absolutely all sales of spirituous liquors in a less quantity than one quart. It was, however, provided, by the sixth section of that act, that its provisions should not extend to druggists or physicians who should sell or give away liquors, in good faith, for purely medical, mechanical or sacramental purposes. Now, it is but fair to presume that the legislature, in adopting this act, understood the act of 1845 to extend to such sales as are specified in the sixth section of the act of 1851, and that the latter act would also, in like manner, extend to such sales without some express provision taking them out of its operation, otherwise it would not have been deemed necessary to adopt the sixth section, and the legislature is not to be presumed as ever doing an unnecessary and useless act. We regard this important, as showing the legislative understanding upon this question. (Laws of 1851, p. 18.) In 1853, the legislature passed an act repealing the act of 1851, and also another act restoring the license system, and all laws relating to that subject which were in force at the time of the adoption of the act of 1851. (Laws of 1853, pp. 91, 153.)

Neither the repealing act, nor the act restoring all former laws on the subject, contained any provision continuing in force the exemption in favor of druggists and physicians, and by no subsequent legislation has such exemption been reenacted or otherwise recognized. We are not authorized to say the dropping, by the legislature, of this provision in favor of druggists and physicians, out of the statute, was merely accidental. On the contrary, we must assume that it was purposely done. And if such is the fact, the only rational object the legislature could have had in doing so was to place druggists and physicians upon the same footing with all other persons with respect to the retail of intoxicating liquors. After the acts of 1853 the law remained without

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any substantial change till 1872, when there was a general revision of the law on the subject. The act of 1872 remained in force until in March, 1874, when the legislature passed what is known as the "Dram-shop act," which, with the exception of one or two amendments not affecting the present inquiry, is the same act now in force. Neither the act of 1872, nor the present act, as we have already seen, contains any exception in favor of druggists or any other class of persons.

Again, in the general Incorporation law, relating to incorporated cities and villages, the municipal authorities are expressly given the power to grant permits authorizing druggists to sell intoxicating liquors by the retail. Now, if druggists did not fall within the general inhibition on this subject, what necessity would there have been for conferring this power of granting permits upon the municipal authorities? We can see none whatever. This provision must, therefore, be regarded as tending strongly to show that the legislature understood the Dram-shop act to extend to druggists, as well as other persons.

The argument upon which counsel chiefly relies, and presses upon the court in vigorous terms, and with an unusual degree of confidence, is drawn largely from what are assumed to be the objects and purposes of the act, and in this connection great significance is given to the particular phraseology of its title, and the legislative use of the term "dram-shop." It is said, in substance, that the act, as shown by its title, is intended to suppress the evils arising from tippling, which "are drunkenness, debauchery, idleness, crime, destitution, loss of health, property, character," etc.; that drunkenness, from which this train of evils flows, is chiefly contracted at tippling houses and dram-shops, and hence it is concluded that the "whole statute is leveled at dram-shops." If, as is claimed, the entire statute is directed against dram-shops and tippling houses, of course it would

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logically follow that a sale by a druggist for purely medical purposes would not fall within the provisions of the act. However plausible this argument may appear, yet upon a close examination of the premises from which it is drawn we are of opinion it is not sound. It seems to us undue importance is given to the term "dram-shop," as used in the act. Now, if the act had, in general terms, simply prohibited the selling of intoxicating liquors without a license to keep a dram-shop, and had not defined what was intended by that term, then it would be but reasonable to presume the legislature used the term in the sense of tippling houses, for this is, without doubt, its popular meaning, and in that event the argument of counsel drawn from the use of that term would seem just and proper. But such is not the case. The legislature having, in the first place, expressly defined what was meant by the term, its meaning or application can not, by any sound rule of construction, be extended by reference to its popular signification.

In determining, therefore, what, if any, importance should be attached to the use of the term, we should keep in view its meaning as defined in the act, and exclude from our consideration altogether its popular meaning, at least so far as it differs from the statutory definition. By doing so, the force of the argument drawn from the use of the term "dram-shop" will be greatly impaired, if not altogether destroyed, for if by the use of that term, as the language of the act defining a dram-shop clearly indicates, the legislature meant any place where liquors are sold in less quantities than a gallon, any well provided drug store as fully answers that description as a tippling house, for all regular druggists are daily and almost hourly in the habit of selling liquors in that way.

For the purpose of keeping in the background the popular idea of a dram-shop, let us suppose, by way of illustration, the legislature, instead of using the term "dram-shop" at all, had, wherever that term occurs, used in its stead the

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definition given of it in the act. Thus, commencing with the second section: "Whoever, not having a legal license to keep a place where spirituous or vinous or malt liquors are retailed in less quantity than one gallon, shall, by himself or another, sell any intoxicating liquors," etc. Had the act been thus drawn, we presume no one for a moment would ever have seriously doubted that druggists, who are constantly in the habit of retailing liquors in less quantities than a gallon, would be bound to take out license before they could legally sell; and yet the case supposed does not at all differ in principle from the one before us.

It may be admitted that the chief ulterior object of the act in question was to mitigate and diminish, as far as possible, the great train of evils that flows from the immoderate use of intoxicating liquors; but the immediate object of the act was to regulate the retail traffic in liquors, rather than to suppress it altogether, without regard to the business callings of those who might happen to be engaged in it, and as a secondary consideration at the same time provide means for defraying at least a portion of the expenses of local municipal government. Long experience has shown that the license system is reasonably efficient for the accomplishment of both these purposes. At any rate, nothing better, so far, seems to have been discovered. In order to properly regulate the retail traffic in liquors, it is important that the officers who are entrusted with the duty of enforcing the law relating to it should be able to know definitely all persons, without distinction, who are engaged in the business, and all places where it is permitted to be carried on. Without such knowledge on their part, it would be utterly impossible to efficiently discharge their duties and see the law faithfully executed. Under the license system this very essential information is always at hand. A few moments examination of the municipal records will enable any one who has an interest in knowing, whether one who appears to be engaged in the business is a legitimate

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dealer or not, and by this means the whole retail traffic may be easily and properly regulated. But let it be once understood that the druggist or other tradesman, merely because his chief business is confined to traffic in other classes of merchandise, may retail intoxicating liquors *ad libitum*, so long as he in good faith sells for some legitimate purpose other than as a mere beverage, the chief safeguards which the law, as now understood, throws around the subject will soon be frittered away, and the doors will be thrown wide open to all manner of frauds and evasions of the law, which would bid defiance to the highest degree of watchfulness and diligence the officers of the law could possibly bring to the official discharge of their duties, in endeavoring to enforce the law on the subject. If the druggist may sell for sickness, the family grocer may, on the same principle, sell for culinary purposes, and there is no telling where the thing would stop. The only safe course is to enforce the law as the legislature has made it, and not defeat its execution upon some hypothetical theory of public policy that finds no place or recognition in the act itself. If the legitimate business of druggists or other tradesmen necessarily involves the retail of liquors in small quantities, we see no reasons, founded upon public policy or otherwise, why they should not, like other dealers, pay for the privilege of doing so. This construction, moreover, compels all persons who engage in the traffic to equally contribute to the support of local municipal government. The contrary construction would be discriminating between individuals engaged in the same business, with respect to the burdens of local government, without any sufficient reason for doing so. The municipal authorities of cities and villages incorporated under the general incorporation law, may, however, subject to certain restrictions provided by ordinance, thus discriminate, if they think proper to do so, by granting to druggists permits for the sale of liquors for medicinal, mechanical, sacramental and chemical

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purposes only; but where this has not been done, druggists are placed upon the same footing in this respect with other dealers.

It is claimed, however, that the views here expressed are in conflict with the decisions in Indiana and North Carolina, construing statutes similar to our own. In construing a statute, so much depends upon other legislation bearing upon the same subject, it is often difficult to determine, with any degree of certainty, the value of a decision upon a mere statutory question. Again, sometimes, where two statutes are in the main alike, there may be slight differences in some portions of the acts, which will lead to different conclusions in construing them, and yet both be right. Without stopping to inquire whether this is so in the present case or not, it is sufficient to say that the conclusion reached by us in this case is, by other authorities of equal respectability, fully sustained. 2 Wharton on Crim. Law, (8th ed.) secs. 1506, 1507; *State v. Gummer*, 22 Wis. 442; *State v. Downer*, 21 id. 274.

But the question, however, is not a new one in this court. *Noecker v. The People*, 91 Ill. 494, was in all its material features like the one before us. That, like the present case, was a prosecution, by indictment, against a druggist for selling liquor without a license in a less quantity than one gallon, where the evidence tended to show the sales were made by him in good faith, for purely medicinal purposes. Under this state of facts the court below was asked to instruct the jury, that if they found from the evidence the sales were so made, they should find the defendant not guilty, which the court refused to do, and on a review of the case in this court the ruling of the circuit court in refusing the instruction was held proper, and the conviction sustained.

Thus, it will be perceived, the question is clearly settled by the case just cited, and we might have simply contented ourselves with a reference to that case; but in deference to

Syllabus.

the very able argument of counsel for plaintiff in error, we have deemed it not improper to reconsider some of the grounds upon which that decision rests.

Judgment affirmed.

MARK A. DEVINE

v.

HENRY C. EDWARDS.

Filed at Ottawa November 10, 1881.

1. **MONEY PAID**—*under mistake of fact, recoverable back.** Where a person buying milk pays for the same, counting each can as containing eight gallons, supposing the cans to hold that much, when in fact they do not, he may set off the money paid by him for the shortage out of any sum he may owe the seller, in a suit for its price.

2. **CONTRACT OF SALE**—*place of delivery.* Where a contract for the sale and delivery of personalty, such as milk, expressly provides that it is to be shipped by the seller to the place of business of the purchaser, at the expense of the seller, the place of delivery is the business place of the purchaser, and any loss on the way must fall upon the seller.

3. **INTEREST**—*when recoverable on an account, in the absence of any agreement to pay.* Under the statute, to entitle a party to recover interest upon an open account, there must be something more than mere delay in making payment after demand. The delay of payment must be both unreasonable and vexatious.†

* Where a person, by mistake, overpays another, he may recover the sum so overpaid, notwithstanding a receipt may have been given. *Stempel v. Thomas*, 89 Ill. 146. Or where the services for which the money was paid have not been performed. *Moore v. Robinson*, 92 id. 491. And generally, as to voluntary and compulsory payments. *County of La Salle v. Simmons*, 5 Gilm. 513, upon a review of authorities by TREAT, C. J.

† As to allowance of interest for unreasonable and vexatious delay of payment, see *Bedell v. Janney*, 4 Gilm. 193; *Hitt v. Allen*, 13 Ill. 596; *Kennedy et al. v. Gibbs et al.* 15 id. 406; *Newlan v. Shafer*, 38 id. 379; *McCormick v. Elston*, 16 id. 204; *Aldrich v. Dunham*, id. 403; *Daniels v. Osborn*, 75 id. 615; *Jassoy v. Horn*, 64 id. 379; *Chapman v. Burt*, 77 id. 337.

Whether there has been an unreasonable and vexatious delay of payment is a question of fact for the jury. *Davis et al. v. Kenaga*, 51 Ill. 170; *Kennedy et al. v. Gibbs et al. supra.*

101	138
146	150
101	138
64a	106
101	138
166	484
101	138
79a	280
101	138
83a	223

Briefs of Counsel.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of DuPage county; the Hon. C. W. UPTON, Judge, presiding.

Messrs. GARY, CODY & GARY, for the appellant:

If, by the mistake of the parties, the amount of the milk was short, and the seller on that account received more money than he was entitled to, he must account for the same, even though the mistake resulted from negligence on the part of the purchaser as well as on the part of the seller. *Devine v. Edwards*, 87 Ill. 177; *Bradford v. City of Chicago*, 25 id. 411; *Rutherford v. McIron*, 21 Ala. 750; *Gooding v. Morgan*, 37 Maine, 419; *Thomas v. Brady*, 10 Pa. St. 164; *Tybout v. Thompson*, 2 Pa. Br. 27; *Miles v. Stevens*, 3 Barr, 37; *Shearer v. Fowler*, 7 Mass. 32; *Goddard v. Bank*, 4 Conn. 147; *Chitty on Contracts*, 543.

Where it is the express contract that the property is to be shipped to the place of business of the purchaser, at the expense of the seller, then the place of delivery is the place of business of the purchaser. *Dunlap v. Lambert*, 6 Cl. & F. 600.

To authorize the allowance of interest upon an open account, the delay of payment must not only be unreasonable, but also vexatious. *Sammis v. Clark*, 13 Ill. 544.

Messrs. BOTSFORD, BARRY & RUSSELL, for the appellee:

No fixed rule can be laid down to determine in every case what shall constitute such unreasonable and vexatious delay in payment as will entitle the creditor to interest. This question must necessarily be determined to a great extent upon the circumstances of each particular case. *Sammis v. Clark*, 13 Ill. 547. See, also, *Mattman v. Williamson*, 69 Ill. 423; *Casey et al. v. Carver et al.* 42 id. 225; *Heiman v. Schrader*, 74 id. 158; *Walker v. Haddock*, 14 id. 399; *Knickerbocker Ins. Co. v. Gould*, 80 id. 388.

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Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was a suit to recover a sum claimed to be due to plaintiff from defendant, for a quantity of milk shipped by the former to the latter from Dundee, Illinois, to Chicago, during the month of March, 1875. Defendant filed a plea of set-off, alleging that for five years next prior to the commencement of the suit he had been purchasing milk of plaintiff by the gallon; that it was shipped in cans supposed by both parties to hold eight gallons each; that payments for the milk, from time to time, were made, on the basis of a capacity of eight gallons to a can; that in fact the cans held a less quantity, and that by the error defendant had overpaid plaintiff a large sum of money, which he offered to set off in this case. There was a verdict and judgment in favor of plaintiff for the full amount of his claim, including interest. On appeal to the Appellate Court for the First District the judgment was affirmed, and defendant appealed to this court.

At the trial in the circuit court defendant asked the following instruction, which the court refused to give:

"The jury are instructed, that even if they believe, from the evidence, that at some time in December, 1870, at Chicago, it was agreed between the plaintiff and defendant that the narrow neck cans (so called) of the plaintiff held eight gallons of milk, yet if the jury further believe, from the evidence, that such agreement was made under the mistaken belief by the defendant that such cans actually held eight gallons, then the defendant would not be bound by such agreement."

This same case was before us on a former occasion, (87 Ill. 177,) when we said with reference to the subject of this set-off: "The contract under which the milk was sold was for a given price per gallon. It was the duty of appellee to see to it that his cans should hold the quantity which he professed they held. It does not lie in his mouth to complain that

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appellant did not watch him with the care which the circumstances seemed to demand. If, in truth and in fact, by the mistake of appellant and that of appellee, the amount of the milk was short, and appellee received more money on that account than he was entitled to, he must account for the same, even though the mistake resulted from negligence on the part of appellant as well as on the part of appellee. The real question is as to the fact of the alleged shortage. If that existed, the appellant is entitled to have the wrong corrected, by way of set-off." We think the same remarks are applicable, although there was the agreement stated in the instruction, if it was made under the mistaken belief as therein named, and that the instruction should have been given.

There was some evidence tending to show that some of the milk, shipped from time to time, was spilled from the cans while on the cars, and the following instruction on that point was asked by the defendant, and refused:

"The jury are instructed, that if they believe, from the evidence, that during the five years immediately prior to the commencement of this suit the defendant purchased milk of the plaintiff by the gallon, to be shipped from Dundee to Chicago, and that the plaintiff agreed to pay the freight on such milk, and that nothing was said by either the plaintiff or defendant in regard to the place of delivery, then the law makes Chicago the place of delivery."

We incline to think this instruction should have been given; that where it is the express contract that the property is to be shipped by the seller to the place of business of the purchaser, at the expense of the seller, then the place of delivery is the business place of the purchaser. (Benjamin on Sales, sec. 693.) And that so, as contended by defendant, if Chicago was the place of delivery, the quantity of milk in the cans upon their arrival at Chicago was the quantity to be considered as having been actually received by defendant.

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The following instruction was given in behalf of plaintiff, and excepted to :

"If the jury believe, from the evidence, that the plaintiff shipped to the defendant milk, in the month of March, 1875, to the value of nine hundred and twelve dollars (\$912), which the defendant received and has never paid for, or any part thereof, and that the defendant has no legal set-off against said demand, then the jury should find a verdict in favor of the plaintiff for said sum; and if the jury further believe, from the evidence, that the plaintiff made demand of defendant for such sum, and that the defendant neglected and refused to pay said sum, and that there has been an unreasonable or vexatious delay in such payment, then the plaintiff is entitled to recover interest on said sum from the date of such demand (if the evidence shows any such demand was made.)"

The allowance of interest in the case of an account like the one in question, is under the statute which gives interest on money withheld by an unreasonable and vexatious delay of payment. This provision does not authorize the recovery of interest where there has been an unreasonable *or* vexatious delay of payment, but only where there has been such unreasonable *and* vexatious delay of payment. *Sammis v. Clark*, 13 Ill. 544, so decides, where this court said: "But it must be clear that there must be something more than mere delay to authorize a recovery of interest under this clause of the statute,—the delay of payment must have been both unreasonable and vexatious."

For error in giving the last instruction and refusing the two others, the judgment of the Appellate Court is reversed, and the cause remanded.

Judgment reversed.

BERTHOLD LÖEWENTHAL

v.

CYRUS H. McCORMICK *et al.**Filed at Ottawa November 10, 1881.*

1. **PLEDGE**—*of note secured by trust deed, to party paying holder.* If a bank advances the money due on a note secured by deed of trust, to the holder, under a contract with the maker that the note shall be transferred to the bank, to be held as a pledge for the repayment of the money so advanced, the lien of the trust deed will remain until the advance is repaid; and if another, under a similar agreement with the maker, pays the bank its advance, and the note and deed of trust are passed over to him as security for the money thus paid the bank, the latter, in equity, will be subrogated to the rights of the bank, and entitled to hold the note and deed of trust as security for the money so advanced by him.

2. Where a party draws his check upon his banker for a sum sufficient to pay off his note secured by deed of trust, and held by another, under an agreement with the bank to make the check good as to any deficiency in his account with the bank, and to take and hold the note and deed of trust in security for the sum paid for him over and above the money deposited to his credit, and it appears from the books of the bank that he had on deposit a sum sufficient to pay the check, less only \$2500, this will be a payment by the maker of the note of its amount, less the \$2500 deficiency in his account, and a discharge of the mortgage, except as to that sum, in favor of subsequent purchasers of the mortgaged premises, and neither the bank nor its assignee can enforce the deed of trust for any more than that sum.

3. **EVIDENCE**—*banker's books.* The entries in the books of a bank being its own declarations in writing, are competent evidence against the bank and its officers of the state of a party's account, and of moneyed transactions with him, and neither the bank, nor its president succeeding to its rights and equities, can be heard to find fault with the manner in which the books were kept.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. ROSENTHAL & PENCE, for the appellant:

If the balance to a man's credit in bank is less than a check presented, the bank need not pay any portion of the

Brief for the Appellees the McCormicks.

check, but must refuse payment altogether. Morse on Banking, 248.

It is of no consequence what form a transaction may assume. The fact that the bank advanced the money to take up the mortgage in this case, upon the faith of the promise that the bank should have the benefit of the security then held by Farwell; and the further fact that the security was delivered to the bank concurrently with the agreement of the bank to pay the check of Walker; and also the further fact that all this was done with the expressed intention of Walker and the bank to preserve the existence of the security to the bank to the amount of \$10,000; and the further transaction as detailed between Walker and Löewenthal—all these are sufficient to stamp the transaction. And the form that the transaction assumed will not invalidate the security in a court of equity, where the substance and not the form is considered. *White v. Knapp*, 8 Paige, 173; *Rogers v. Traders' Ins. Co.* 6 id. 583; *Angell v. Boner*, 38 Barb. 425; *Keystone Bank v. Gay*, 21 id. 459; *Graves v. Mumford*, 26 id. 94; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Dunn v. Seymour*, 3 Stockt. 278; *Markell v. Eichelberger*, 12 Md. 78; *Chase v. Ridgley*, 7 H. & J. 170; *Dodge v. Freedman's Savings Bank*, 93 U. S. 379; *Gault v. McGrath*, 8 Casey, 392.

Mr. W. T. BURGESS, for the appellees C. H. and L. J. McCormick:

It is clear that Walker gave to J. V. Farwell & Co. a check for \$16,160, to pay the Laughton note with. That check was charged by the bank to Walker in his account, and he paid the note so far as the account between him and the bank goes, for in that day's business he had a clear credit of \$7481.47, and it is for the bank to overcome the statement of its own books, and show such a different state of facts to exist as to entitle it or the present complainant to recover.

Opinion of the Court.

The circuit court erred in finding that Löwenthal was entitled to be subrogated to the bank for the \$2519.53, and interest.

Messrs. WILLIAMS & THOMPSON, for the appellee D. C. Collins, reviewed and commented at some length upon the facts, and evidence in support of the same.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court :

This was a bill in equity, brought by appellant, Löwenthal, to foreclose a trust deed on the north half of a certain block in Chicago, executed by S. J. Walker, to secure a note of \$16,000, payable to Adeline Laughton, bearing date June 20, 1871, due in two years. After the trust deed was upon record, and on the 1st day of October, 1872, Walker conveyed a portion of the premises to C. H. and L. J. McCormick, and on the 23d day of November the balance of the property he conveyed to DeWitt C. Collins. The note and trust deed were transferred by Adeline Laughton to J. V. Farwell & Co. After the note became due, Walker, under an arrangement with the International Bank, the terms of which are in dispute, drew his check on the bank for the amount of the note, which was delivered to Farwell & Co., and they passed the note and deed of trust over to the bank. Subsequently the note and deed of trust were passed over by the bank to Löwenthal. The contract under which this last transfer was made is also in dispute.

It is contended by appellant that the bank agreed with Walker to advance him \$10,000, to be paid to Farwell & Co., to lift the note, and that the note and deed of trust were to be held by the bank for that amount; that the money was advanced and used for that purpose; that afterwards appellant furnished Walker the money (\$10,000) to pay the bank, and the note and deed of trust were delivered to him, to be held as security for the money so advanced. The defendants,

Opinion of the Court.

McCormicks and Collins, claim that Walker paid the note and deed of trust held by Farwell & Co.; that neither the bank nor appellant advanced any money in payment of the note, and hence the note and deed of trust can not be held by appellant on account of advances secured. If the money claimed was advanced, the deed of trust was only continued in force for the amount necessary to make Walker's account good at the bank when the transaction occurred, which was \$2518.53.

This case presents no intricate questions of law. If the International Bank advanced \$10,000 to pay Farwell & Co. the amount of the Laughton note, under a contract with Walker that the note should be transferred to the bank to be held as a pledge for the repayment of the money advanced, it is plain that the lien created by the deed of trust would remain until the money advanced was repaid. It is also apparent that if appellant, under an agreement with Walker, afterwards furnished the money to repay the bank the amount it had advanced, and the note and deed of trust were passed over to him as security for the money thus paid the bank, he, in equity, would be subrogated to the rights of the bank, and entitled to hold the note and deed of trust for the amount he advanced on the faith of the securities.

But it is said the bank did not advance the money claimed to have been used to pay Farwell & Co., but, on the other hand, Walker's money, which was at the time standing to his credit on the books of the bank, paid Farwell & Co. It must be conceded that there is much force in this position, and the evidence bearing upon it is not free from doubt. Walker gave his own check to Farwell & Co., on the International Bank, on the 23d day of July, 1873, for \$16,160, to pay them the amount of the Laughton note. This check was charged by the bank to Walker in his account, and there remained to his credit at the close of business hours on the 24th day of July, the day the check was paid, \$7481.47,

Opinion of the Court.

as is shown by the books of the bank. Again, the books of the bank do not show, on July 23 or 24, that Walker gave his note, or any other evidence of indebtedness, which they should have shown if the bank loaned him \$10,000; as claimed. It is true that the bank may have advanced the money and taken no evidence of the loan, but such is not the usual manner of transacting such business in banks, and where business is transacted in such a loose manner by men who are, or ought to be, skilled in business transactions, it is well calculated to excite suspicion. But Walker, who seems to be a disinterested witness, testified that he made an agreement with the bank that it should advance \$10,000 towards the payment of the note, and that it was to hold the note and deed of trust as security. Löewenthal, who was at the time president of the bank, testified that the bank agreed to advance the money, and that the money was actually advanced and placed to the credit of Walker. The books of the bank show on the 24th day of July three items, of \$10,000 each, deposited by Walker on that day. From this evidence the circuit court found that the money was advanced by the bank; and while we are free to admit that the question is not free from doubt, yet, after a careful examination of all the evidence bearing on the question, we are not prepared to say that the finding is not in harmony with the weight of the evidence.

The next question that arises is whether appellant paid to the bank the money which it had advanced, and received the note and trust deed, as alleged in the bill. Löewenthal testified that the bank carried the Walker loan from the 24th day of July until July 30; then he furnished Walker means to pay the bank, and the Laughton note and the deed of trust were turned over to him. He did not pay the cash himself, but gave his note to Walker for \$10,000, due in sixty days, which Walker indorsed over to Greenebaum & Foreman, obtained the money, and deposited it in the bank that day.

Opinion of the Court.

The note was produced in evidence, and Foreman testified that his firm had purchased it from Walker. Walker, in his evidence, does not remember how the money was paid, but does recollect that appellant agreed to arrange it for him. In confirmation of appellant's evidence a note was produced, which Walker gave him on July 30, for \$10,000, payable in sixty days. The note contained the following recital: "Having deposited with said International Bank, as collateral to secure the payment hereof, my note for \$16,000, dated June 30, 1871, secured by trust deed to Rufus A. Rice, trustee." The books of the bank, offered in evidence, show that on July 30 Walker deposited three sums of money, of \$10,000 each, on that day. These are the main facts relied upon to prove that appellant paid to the bank the money which it had advanced, and received the note and trust deed to secure him for such payment, and were it not for the fact that appellant's testimony was in conflict with his evidence given in the case on the first trial of the cause, when he testified that he, in person, paid to the bank the \$10,000 in cash, there would be but little doubt in regard to the sufficiency of the evidence; but while the credibility of appellant is somewhat shaken, still the other evidence seems to corroborate his testimony to such an extent that we are inclined to hold that the finding of the court on this branch of the case may be sustained.

But, conceding that the bank, on the 24th of July, and Læwenthal, on the 30th of the same month, made advances, under an agreement with Walker, the question then arises how much money was advanced for which the Laughton note and trust deed can be held as security as against the rights of appellees, who were purchasers before the arrangement was made between Walker and the bank. If Walker paid Farwell & Co. the amount of the Laughton note with his own funds, derived from any source other than the bank, then the note and trust deed became extinguished, and no decree of

Opinion of the Court.

foreclosure can be rendered thereon; or if any part of the note was paid by funds which were not obtained from the bank, to the extent of such payment the note would be extinguished, and the premises in the deed of trust released from that portion of the debt. It must be remembered that Walker drew his check on July 23, on the bank, for the full amount due Farwell & Co., (\$16,160,) under an arrangement that the bank would pay the check, the securities to be held for the amount advanced. Löwenthal testified: "I sent one of the messengers of the bank with Mr. Walker to J. V. Farwell & Co. to get those documents. We paid the \$16,160 check upon the delivery of these securities to the bank. I regarded it as security for the money advanced. * * * Mr. Walker's account was running with the bank. It was utterly impossible, during business hours, to tell at any time exactly how his account stood. Neither Mr. Walker nor I knew at the time of the conversation how much money he needed; but he told me that he wanted the bank to pay his check upon the delivery of these securities, and that he would arrange the next day for it, some way." It is obvious, from this evidence, that the arrangement was that the bank should honor Walker's check, and hold the Laughton note and deed of trust for such an amount as it should advance for that purpose. If it was necessary to advance the whole amount, that was to be done; if one-half, that was to be furnished; in other words, neither Walker nor Löwenthal knew the condition of his bank account, and what sum was needed over and above what Walker had in bank to his credit on July 24, was to be furnished.

From an examination of the books of the bank it appears that on July 24, after all checks had been paid, including the one given to Farwell & Co., and business had been closed for the day, Walker had to his credit \$7500. He had provided from other sources all the money necessary to pay his check, except as to the sum of \$2500. This, and this alone,

Opinion of the Court.

was all that the bank had to advance in the payment of Walker's check, and if the bank advanced \$10,000 to Walker, such sum was not required to protect his check, and the bank can not hold the note and deed of trust as security for such a sum. On the day the check was paid by the bank Walker had to his credit of his own money, aside from any amount advanced by the bank, enough to pay the check, less \$2500. When, therefore, the check was paid, Walker's funds, and not the funds of the bank, paid it, save only as to the sum of \$2500.

Appellant, however, seeks to avoid the force and effect of the plain facts shown by the books of the bank, by claiming that the book-keeping is bad,—that the check should not have been charged in the account when paid, but held as an obligation or cash memorandum against Walker until it was paid. Neither Löewenthal nor the bank is in a position to find fault with the manner in which the books were kept. The books are their own declarations in writing, which are competent evidence against them, however much they may now stand in the way of their present position. But the books were kept in the ordinary way. Walker's account was credited with all the money he received, and charged with such checks as he drew and were paid by the bank. How this method of book-keeping could work out a bad result, we are at a loss to perceive.

After a careful examination of all the evidence, we are satisfied the decision of the Appellate Court affirming the decree of the circuit court was right, and it will be affirmed.

Decree affirmed.

THE CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY *et al.*

v.

THE TOWN OF ST. ANNE *et al.*

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Filed at Ottawa November 10, 1881.

1. **REMEDY**—*to compel the issue of corporate bonds.* A court of chancery has no jurisdiction to entertain a bill to compel the corporate authorities of a town to issue and deliver its bonds in pursuance of a vote to aid in the construction of a railroad. The proper remedy is by *mandamus*. Such court has not the power to compel the performance of contracts for the payment of money, or to give notes or bonds.

2. **CREDITOR'S BILL.** A bill can not be maintained as a creditor's bill when not framed as such, nor when no judgment has been obtained and execution returned *nulla bona*.

3. **MUNICIPAL BONDS**—*of rights in respect thereto.* Under an authority to a town to vote a donation in aid of a railroad company, and to levy and collect taxes to pay the same, or to vote such aid and to borrow money to pay the same, and to issue interest-bearing bonds to pay such loans, the company can not be compelled to take bonds of the town in payment, nor can it compel the town authorities to issue bonds to it. The company, in such case, has only a claim for money, and has no right to say how the money shall be raised.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Kankakee county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

Mr. ROBERT DOYLE, for the plaintiffs in error:

A court of equity will compel the delivery of municipal bonds voted by a town, to an equitable assignee. *Thomas v. Morgan County et al.* 59 Ill. 488; *Morgan County v. Thomas et al.* 76 id. 141; *Morris et al. v. Cheney*, 51 id. 451.

The bonds or debt of the town to the railroad company is a trust fund, to be held for the payment of the company's debts, or if assigned by the company in payment of a debt, then for the payment of such assignee. *James v. Woodruff*,

Brief for the Defendants in Error. Opinion of the Court.

2 Paige, 541; S. C. 2 Denio, 574; *Morgan County v. Thomas et al.* 76 Ill. 148; Angell & Ames on Corp. sec. 779a.

If a trust is created for the benefit of a party who is to be the ultimate receiver of the money or other thing, he may sustain a suit in equity to have the money or other thing directly paid or delivered to him, for in such case he is entitled to dispose of it as the absolute owner. Story's Eq. Jur. sec. 1250. See, also, as to the question of jurisdiction, *Riddle v. Mandeville*, 5 Cranch, 329; *Townsend v. Carpenter*, 11 Ohio, 21; *Taylor v. Reese*, 44 Miss. 89.

MR. H. LORING, MR. T. P. BONFIELD, and MR. C. R. STARR, for the defendants in error:

The vote of the town, even if sufficiently formal, did not, of itself, create an indebtedness. The vote was simply authority for the town authorities to give aid to the railroad company,— authority to create an indebtedness. We think all the cases in reference to railroad aid bonds will be found to sustain that view of the voting. Such is the view of the court in *Aspinwall et al. v. Board of Comrs. of the County of Davis*, 22 How. 364, *Board of Comrs. of Town of Concord v. Portsmouth Savings Bank*, 2 Otto, 626.

The bill shows an indebtedness from the town to the railroad company was not created by bonds. It avers bonds were written out but never delivered. Delivery was as essential as signing.

To show that a court has no jurisdiction to compel the town authorities to issue and deliver bonds on the ground of their equitable assignment, counsel cited Story's Eq. Jur. 1057a; *Chicago and Northwestern Ry. Co. v. Nichols et al.* 57 Ill. 465.

MR. JUSTICE WALKER delivered the opinion of the Court:

Plaintiffs in error filed a bill to compel defendant in error the town of St. Anne, to issue its bonds to it for \$30,000,

Opinion of the Court.

claimed to have been voted to aid the company to construct its road. The charter of the company authorized the electors of the town to vote a donation to the company to aid in the construction of its road, and to levy and collect taxes to pay the same. By an amendment of the charter of the company the town was authorized to vote such aid, and to borrow money to pay the same, and to issue interest-bearing bonds for the payment of such loans. A citizen of the town filed a bill to enjoin it from issuing the bonds, and pending the suit the town filled up bonds for the amount, and they were signed by the proper authorities, and placed in the hands of the circuit clerk, to hold until that suit should be terminated. The town afterwards destroyed these bonds, and refused to issue other bonds and deliver them to the company.

It appears that J. E. Young & Co. had, under a contract with the railroad company, constructed 110 miles of the road, and that the company is largely indebted to them, and that it is insolvent. It further appears, that by the contract the railroad company assigned and transferred to them all of the local aid and subscriptions along the line of the road which had at the time been, or should afterwards be, made to the company. This donation was voted some four months after the contract was executed. It does not appear that complainants were parties to or knew of the arrangement by which the bonds were filled up, signed, and delivered to the clerk, to hold until the suit for an injunction should be terminated. Young & Co. claim, that by virtue of the contract with the railroad company, they, as assignees, are entitled to have bonds for that amount issued by the town and delivered to them, and hence have brought this bill to compel their issue.

Has chancery jurisdiction to compel the town to issue and deliver such bonds? If it has, under what head does it fall? Not under the power to compel a specific performance of contracts, as such a bill does not lie to compel the performance

Opinion of the Court.

of contracts for the payment of money, or to enforce agreements to give notes or bonds, as in such cases there is an adequate remedy at law. Nor has that court jurisdiction to compel parties to perform acts of this nature. If there be exceptions, they are rare, and relate to contracts or acts of a different character from this.

If complainants are entitled to have these bonds issued, it must be by *mandamus*, and equity can not afford relief by that writ. Nor can the suit be maintained as a creditor's bill. It is not framed as such, nor has a judgment been recovered, and an execution returned no property found, to entitle complainants to maintain the bill under the statute, even if that would entitle them to relief, but it is in effect to procure a writ of *mandamus*. Such a decree would be novel, and, it is believed, unheard of, in practice. To maintain it would be to abolish all distinction between proceedings in chancery and those for relief by *mandamus*. So long as distinctions between forms of action and proceedings in our courts exist, they must be observed.

But, aside from all this, the provisions of the charter authorize the donation in money, and not in bonds. But it is provided that when so authorized by vote, the town authorities may borrow money to pay the donation, and issue bonds of the town for its payment. It is purely a matter of discretion, to be exercised by the town authorities, whether they will raise the amount by taxation, or borrow it and issue bonds of the town. The railroad company only has a claim for money, and has no right to say whether it shall be raised in the one or the other mode. If the law has been in all things complied with in voting the donation, the town is liable for the payment in money of the sum voted, and no reason is perceived why the amount could not be recovered by an action at law. If the bonds were issued, the railroad company could not be compelled to receive them instead of money, nor can it compel the town to issue its bonds.

Syllabus. Opinion of the Court.

We have examined the authorities to which reference has been made, but fail to see that they are applicable to the facts of this case. Nor do we find in this record any error, and the decree of the Appellate Court is therefore affirmed.

Decree affirmed.

ASAHEL GAGE

v.

NEIL McLAUGHLIN.

Filed at Ottawa November 10, 1881.

CHANCERY—*of the bill to remove cloud on title.* A bill to set aside certain deeds made for property sold for taxes, as a cloud upon the title, which fails to allege any invalidity in the sale or tax deeds, is bad on demurrer.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. AUGUSTUS N. GAGE, and Mr. HENRY D. BEAM, for the appellant.

Mr. J. J. KERRIGAN, and Mr. R. B. BACON, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill or petition filed by Neil McLaughlin, ostensibly under the act of April 19, 1872, known as the Burnt Records act. Petitioner claimed title to the lands described in the bill, being several lots in a certain subdivision of a tract of land in Cook county, by foreclosure of a mortgage made by one Andrew Cook to petitioner June 1, 1872, and a master's deed, under the decree of foreclosure and sale, executed August 3, 1873. The petition made parties the widow and heirs of Andrew Cook, who died July 11, 1872, before

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said decree of foreclosure, and also Asahel Gage, who is alleged to claim an interest in the premises by virtue of two tax deeds executed by the sheriff and county clerk of Cook county, and dated, respectively, September 8, 1869, and July 19, 1879. Asahel Gage appeared, and filed a demurrer to the bill, and the same being overruled by the court, he elected to stand by his demurrer. The court in its decree found, on the report of the master, that the widow and heirs of Andrew Cook had no interest in the premises, and decreed that the petitioner was the owner, in fee simple, of the lands described in the petition. Gage appealed.

There is no allegation in the bill which entitles the petitioner to any relief as against the defendant Gage. The sole allegation with respect to him is, that on July 11, 1874, there was recorded in the recorder's office of Cook county, a deed, dated September 8, 1869, executed by the sheriff of said county to Asahel Gage, pertaining to one of the lots; that there was recorded in said office, on July 19, 1879, a deed from the county clerk of said county to Asahel Gage, pertaining to said lots; "that said two deeds purport to be tax deeds, and said Asahel Gage claims to have some interest in said lots by virtue of said deeds." If plaintiff relied upon any invalidity of defendant's tax deeds, he should have alleged the same in his bill, which he does not do.

Appellee claims the allegation of the bill was sufficient, under the clause in the Burnt Records act, that the petitioner "shall give the names of all persons owning or claiming any estate in fee in said lands, or any part thereof." This bill, while ostensibly filed under that act, is in reality one filed to remove the tax deeds of Gage as clouds on petitioner's title. All the case made under that act is, that the power of attorney to one Rees to lay out the subdivision in which the lots are situate, the plat of the subdivision, and certain antecedent deeds in the chain of title, were destroyed by fire on October 9, 1871.

Syllabus.

The only persons named as defendants, besides Gage, were the widow and heirs of Andrew Cook, the mortgagor. The widow and heirs evidently claimed no interest in the premises after the making of the master's deed under the decree and sale in foreclosure. The mortgage of Andrew Cook to the petitioner, the foreclosure proceedings, the sale and master's deed, were all long subsequent to the fire, and needed no proceeding under the Burnt Records act to establish and confirm them. The only object of the bill must have been to set aside the tax deeds of Gage. The bill makes no case for having them set aside, and the demurrer of Gage should have been sustained.

The decree, as respects Gage, is reversed, and the cause remanded for further proceedings consistent herewith.

Decree as to Gage reversed.

THE PITTSBURG, FORT WAYNE AND CHICAGO RAILROAD COMPANY

v.

MICHAEL REICH.

Filed at Ottawa November 10, 1881.

1. EVIDENCE—*opinions of witnesses as to use, etc., of highway.* Whether a thoroughfare is used, and how used, and worked upon by public authorities, or abandoned, depends upon certain facts only, and not on the opinions of witnesses. So, also, the use made of a street by a railroad company is an existing fact, while the use that ought to be made of it is a mere matter of opinion. Witnesses not experts should be allowed to testify only to facts, and not to give their opinions, and leave the jury to draw conclusions from the facts.

2. In a suit by a lot owner against a railroad company to recover damages to his lot, caused by the use of a street fronting the same, for railroad tracks, and thereby preventing ingress and egress to and from the same, etc., the statements of the officers of the road as to the intended future use of the street are not admissible in behalf of the company, as being hearsay, and a

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30a 496

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31a 458

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41a 236

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58a 462

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184 596
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Syllabus.

matter of opinion. An actual direction as to its use might be proper evidence in such case.

3. *HIGHWAYS—STREETS—of their use for railroad purposes—extent of the use granted.* A grant of power to a railroad company to construct its road upon or across a road or highway which the route of its road may intersect, the corporation to restore the road or highway to its former state, or in a sufficient manner not to impair its usefulness, is equivalent to allowing a joint use of the highway by the company with the public, protecting its use as an ordinary highway against any impairment. It does not authorize a use to the exclusion of ordinary travel thereon.

4. *SAME—power of county or town officers to grant use of street or highway for railroad purposes—under act of 1849.* Section 26 of the general Railroad act of 1849, authorizing the county or town officers having charge of lands belonging to their county or town to grant the right of way over the same to railroad corporations, has application only to lands which belong to counties and towns as owners thereof, and not to lands in which they hold the nominal title only, for a prescribed public use, such as for a street or highway.

5. *SAME—powers of commissioners of highways in that regard.* The commissioners of highways of a town, having no title to an avenue or public highway, are powerless to grant the same to a railroad company by deed, so as to pass an exclusive right to its use, and a deed by them attempting to grant such right is void.

6. *SAME—effect of act of 1861 as to right of way of Pittsburg, Fort Wayne and Chicago Railroad Co.* The second section of the "act to perfect the title of the purchasers of the Pittsburg, Fort Wayne and Chicago railroad, and to enable them to form a corporation," approved February 8, 1861, has no reference to the mode of acquiring the right of way, and does not have any retroactive operation to validate titles to right of way.

7. *SAME—right of action to lot owner for improper use of street for railroad purposes.* A lot owner has a right of action to recover damages to his lot from the unauthorized laying of additional railroad tracks in the street fronting his lot, whereby the use of the street for all ordinary purposes of a highway is destroyed, and access to the lot is cut off, and for the creating of a nuisance by allowing stock cars to stand in the street adjoining the lot.

8. *RIGHT OF WAY—benefits to other property not properly a set-off to damages.* Where a lot is divided by a street laid through the same, benefits to one part of the property can not be set off against damage to the other part on the other side of the street by the laying of railroad tracks in the street so as to prevent access to the same, and excluding ordinary travel on the street.

9. *LIMITATION—what is color of title.* As the commissioners of highways can not be grantors of land in any case whatever, their deed for a highway is void, and can not be relied on as color of title under the Limitation law.

Statement of the case.

10. *SAME—the use must be adverse.* The grant of a joint and mutual use of a highway to a railroad corporation with the public, can not be set up under the Limitation law of 1839 as a bar, as the use in such case by the corporation is not adverse.

11. *NON-SUIT—upon the evidence.* On a trial by the court without a jury, where there is evidence tending to show a right of action, a proposition that under the evidence no recovery can be had, is properly refused. In such case the weight of the evidence is for the court.

12. *PRACTICE IN THE SUPREME COURT—what may be assigned as error.* Where it is not assigned as a ground for a new trial in the circuit court that the damages are excessive, nor any assignment of that cause for error in the Appellate Court, it can not be urged in this court that the damages are excessive.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

Appellee, on the 6th of March, 1876, brought his action on the case, against appellant, in the circuit court of Cook county, alleging his damages at \$20,000, for injuries to the west half of lot 22, School Trustees' subdivision of section 16, town 38, range 14 east, containing five acres, situated on the north-east corner of Fifty-ninth street and Stewart avenue, by reason of the location and operation of certain railroad tracks on said avenue.

The declaration contains eight counts. The first, second, fourth, fifth and seventh aver, in substance, a wrongful occupation of said avenue with four railroad tracks, so as to render said avenue impassable for vehicles, and depriving appellee of ingress and egress to and from the west half of said lot. The third count avers a wrongful carrying away of 5000 loads of earth from the said avenue, in front of said premises. The sixth count avers that the appellant unlawfully, wrongfully and negligently stored and left standing on said tracks, opposite said premises, and in close proximity thereto, a large number of hog and cattle cars, in a filthy condition, and continued so to do, thereby rendering said

Statement of the case.

premises uninhabitable, etc. The eighth count avers that the appellant so carelessly and negligently managed and operated said road, as that large quantities of cinders, dust and coal were thrown and cast upon said premises, whereby, etc. To all these counts the appellant pleaded, (1,) the general issue, and (2,) the Statute of Limitations, and to all the counts, except the sixth and eighth, it pleaded, (3,) seven years' possession and payment of taxes under claim and color of title, and (4,) *liberum tenementum*, by virtue of sec. 8, chap. 24, Rev. Stat. 1845. To the fourth plea the appellee replied specially that the land was not subject to taxation.

The cause was tried by the court without the intervention of a jury, and a verdict rendered for the plaintiff, assessing his damages at \$2000. Motion for new trial was made upon the grounds:—1. The court admitted improper testimony on the part of plaintiff. 2. The court excluded proper testimony on the part of defendant. 3. The court erred in refusing the propositions of law, and each of them, submitted on behalf of the defendant. 4. The finding of the court is against the evidence. 5. The finding of the court is against the law. But the motion was overruled, and judgment rendered for \$2000. An appeal was prosecuted by the defendant from that judgment to the Appellate Court for the First District, and the following errors were there assigned:

First—The circuit court admitted improper testimony on behalf of the appellee.

Second—The said circuit court rejected competent and proper testimony on behalf of said appellant.

Third—The said circuit court erred in refusing to hold the 1st, 3d, 4th, 5th, 8th, 11th, 14th and 15th propositions of law, and each of them, submitted by said appellant.

Fourth—The finding of said circuit court that said Stewart avenue, so-called, is now a public highway, was and is against the evidence, and is erroneous.

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Fifth—The finding of said circuit court that appellant had no legal right to lay or operate any railroad track on said Stewart avenue, so-called, was and is erroneous.

Sixth—The said circuit court erred in overruling appellee's motion for a new trial.

The Appellate Court, on considering the case, affirmed the judgment of the circuit court. This appeal is also prosecuted by the defendant below to reverse that judgment, on the ground that the Appellate Court erred in affirming the judgment of the circuit court.

The following evidence was agreed to by stipulation of parties: "For the purpose of this suit it is agreed that the north-east quarter of section 16, town 38 north, range 14 east of the third principal meridian, in the town of Lake, in the county of Cook, aforesaid, was school land, and was subdivided by the school trustees, and a plat thereof made before the purchase of lot 22 in said section by said plaintiff; that said plat was not acknowledged or recorded; that a copy of such plat may be received in evidence in this case, with all the force and legal effect of the original, were it in existence, the defendant reserving the right to object to the sufficiency of said original plat, for any purpose, as competent evidence in this case; that the abstract of title to said lot 22, made by Handy, Simmons & Co., dated December 8, 1875, may be offered in evidence by either party without objection; that in 1858 the Pittsburg, Fort Wayne and Chicago Railroad Company, under a deed, duly acknowledged and delivered, from the commissioners of the town of Lake to it, dated May 17, 1858, entered upon a strip of land running north and south through said section 16, and on the west end of said lot 22, called Stewart avenue, or School street, sixty-six (66) feet in width, by putting down its first railroad track opposite said lot 22, and the rails of said track being west of the centre of said so-called Stewart avenue; that on March 2, 1862, this defendant, by deed from Lanier and others, shown

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in printed book hereinafter referred to, became the owner and possessor of all the right of way and property of said Pittsburg, Fort Wayne and Chicago Railroad Company, as shown by said deed; that in 1869 this defendant, in pursuance of said conveyance to it, put down a second track opposite said lot 22, and east of the centre of so-called Stewart avenue; that in 1874 the defendant, being in possession of said two railroad tracks, under said conveyance last aforesaid, put down two other tracks opposite said lot 22, in said so-called Stewart avenue, one of which was east and the other west of said two tracks already laid, and that said defendant has used and occupied all of said tracks, claiming to be the owner of said so-called Stewart avenue, by operating said tracks with its cars thereon; (all matters contained in a printed book, purporting to be copies of charters, contracts, court proceedings, etc., relating to the creation and existence of said defendant as a corporation, are correct copies of the original documents, and may be offered in evidence the same as the originals, subject to objection as to their competency or relevancy in this case;) that the defendant, the Pittsburg, Fort Wayne and Chicago Railroad Company, has, ever since May, 1858, made returns, in accordance with law, to the proper officers, of all its real estate in said county; that the whole of said so-called Stewart avenue lying in said town of Lake, has been each year so returned by said company; that taxes have been annually levied on all the real estate so returned, and that all such taxes have been duly and annually paid by said corporation since May 17, 1858, up to date, but plaintiff does not admit that any taxes have been or could be legally levied, assessed or imposed on said strip of land; that all the conditions contained in the deed of right of way over the so-called Stewart avenue, being the sixty-six feet strip of land in controversy herein, from the commissioners of highways of the town of Lake to said railroad company, dated May 17, 1858, were duly and completely

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fulfilled and performed, and that said deed may be received in evidence, subject to all objections thereto."

Title in plaintiff to said lot 22 was proved, he having received a deed therefor from the Governor on the 6th day of September, 1851, and he immediately entered into possession. It was also proved said lot was subsequently divided by running a street north and south through it, called School street, and thereafter the street running north and south on the west side of the lot was called "Stewart avenue." Evidence was given tending to show damage to the marketable value of plaintiff's property, and also special injury by being cut off from access to the property, and from dust, cinders, etc., and from foul smells because of allowing stock cars to stand on the track adjacent to the property.

Messrs. WILLARD & DRIGGS, for the appellant:

The lot is a subdivision of school land owned by the State, and platted by school trustees. The plat not having been acknowledged and recorded, the title to the land in the avenue remained in the State. *City of Chicago v. Rumsey*, 87 Ill. 348.

The exercise of the power to lay tracks on said avenue was entered upon, and two of the tracks were actually laid before the rule under the constitution of 1870 took effect. The first proposition, therefore, was correct, under the authority of *City of Chicago v. Rumsey*, 87 Ill. 348; *Chicago, Rock Island and Pacific R. R. Co. v. City of Joliet*, 79 id. 25.

As to the third proposition: It was expressly held in *Lake Shore and Michigan Southern R. R. Co. v. Pittsburg, Fort Wayne and Chicago Ry. Co.* 71 Ill. 38, that the Lanier deed was color of title to the land occupied by the railway company as a right of way. The commissioners' deed to the appellant is of the same character, and is fully within the ruling of the Supreme Court in that case. *McClellan v. Kellogg*, 17 Ill. 498; *Hinchman v. Whetstone*, 23 id. 108; *Dickenson v. Breeden*,

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30 id. 326; *Brooks v. Bruyn*, 35 id. 392; *Winstanley v. Meacham*, 58 id. 97; *Hardin v. Gouveneur*, 69 id. 140; *Allen v. Munn*, 55 id. 486.

The eleventh proposition: Sections 1 and 9 of the charter of the Fort Wayne and Chicago Railroad Company, granted by the State of Illinois, had the same effect as to Stewart avenue, in the town of Lake, as the Chicago ordinance had as to Beach street, in the city of Chicago, viz: to allow the company to properly lay and operate its tracks therein without liability for consequential damages to adjoining property. *Moses v. Pittsburg, Fort Wayne and Chicago R. R. Co.* 21 Ill. 511; *Chicago, Rock Island and Pacific R. R. Co. v. City of Joliet*, 79 id. 25.

Mr. THOMAS S. McCLELLAND, for the appellee:

1. Stewart avenue became a public highway by virtue of the act of the school trustees in 1851, and under the statutes of Illinois relating to the subdivision of school lands. Rev. Stat. 1845, chap. 98, secs. 13, 14, 15.

2. The school trustees being agents of the State in subdividing the section into lots, with spaces left open for streets or highways, it will be presumed that the public are allowed to use such spaces for public travel, and it is incumbent upon the party denying the fact of its being a public highway to overcome the presumption by proof, and show that such spaces were not intended for streets. *Angell on Highways*, sec. 143; *Eyman et al. v. The People*, 1 Gilm. 4; *Dumoss et al. v. Francis*, 15 Ill. 543; *Green et al. v. Oakes*, 17 id. 249; *Jarvis v. Dean*, 3 Bing. 449.

3. The duty of the town and its road officers was limited to keeping the highway in repair for the use of the public. They had no power to turn it over to the railroad company. *Stack v. City of East St. Louis*, 85 Ill. 377; *Peoria and Rock Island Ry. Co. v. Schertz et al.* 84 id. 135; *Kreigh et al. v. City of Chicago*, 86 id. 407; *Drake v. Hudson River R. R.*

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Co. 7 Barb. 508; *Tate v. Ohio and Mississippi R. R. Co.* 7 Porter, (Ind.) 479; *Hynes v. Thomas*, 7 id. 38; *City of Pekin v. Winkel*, 77 Ill. 58; *Indianapolis, Bloomington and Western R. R. Co. v. Hartley*, 67 id. 439; *City of Pekin v. Brereton*, 67 id. 477; *City of Jacksonville v. Jacksonville Ry. Co.* id. 541; *St. Louis, Vincennes and Terre Haute R. R. Co. v. Copps*, id. 607.

4. The general Railroad law of 1849 prohibits railroad companies from using highways in such manner as to render them unfit for public use. Laws of 1849, p. 24, sec. 21, div. 5.

5. The highway commissioners had no power to allow the railroad to enter upon the street. All such authority is derived from the legislature. 2 Dillon on Mun. Corp. sec. 518; *Davis v. Mayor*, 14 N. Y. 517; *Milhan v. Sharp*, 27 N. Y. 619.

6. It is not within the power of highway commissioners, or even the municipal corporation itself, to permit railway companies to blockade public highways and render them impassable; and railways, notwithstanding their pretensions to act under license acquired from such authorities, will be liable to the property owners damaged thereby. *Stack v. City of East St. Louis*, 85 Ill. 578; *Peoria and Rock Island R. R. Co. v. Schertz*, 84 id. 135; *Kreigh v. City of Chicago*, 86 id. 410; *City of Quincy v. Jones et al.* 76 id. 231; *St. Louis, Vandalia and Terre Haute R. R. Co. v. Haller*, 82 id. 208; *City of Shawneetown v. Mason et al.* 82 id. 337; *Eberhart v. Chicago, Milwaukee and St. Paul Ry. Co.* 70 id. 347; *St. Louis, Vandalia and Terre Haute R. R. Co. v. Copps*, 72 id. 188; *Chicago and Pacific R. R. Co. v. Francis*, 70 id. 238; *Chicago, Milwaukee and St. Paul R. R. Co. v. Hall*, 90 id. 42; *Chicago and Iowa R. R. Co. v. Hopkins et al.* 90 id. 316; *Terre Haute Gas Co. v. Teel*, 20 Ind. 131.

7. As to measure of damages: *St. Louis, Vandalia and Terre Haute R. R. Co. v. Haller*, 82 Ill. 211; *Illinois Central*

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R. R. Co. v. Grabill, 50 id. 245; *Ottawa Gas Light and Coke Co. v. Graham*, 28 id. 73; *St. Louis, Vandalia and Terre Haute R. R. Co. v. Copps*, 72 id. 190.

8. Appellant can not plead the Statute of Limitations in bar. The avenue was held for public use as a street, and the title was either in Reich or in the State. The property was school land. Rev. Stat. 1845, p. 104, sec. 10; *Logan County v. City of Lincoln*, 81 Ill. 158; *City of Alton v. Transportation Co.* 12 id. 59; 2 Dillon on Mun. Corp. secs. 532, 533.

Possession must be adverse to the true owner, and exclusive. *Cook v. Norton et al.* 48 Ill. 20; *Weaver v. Wilson*, id. 125.

Appellant, up to 1874, occupied this street jointly with the public. Even if its color of title could be claimed as acquired in good faith, and even if the Statute of Limitations could run against this public highway, it could not enlarge its color, *i. e.*, to extend over any part of the street not actually occupied by it, to-wit, that part not covered by its first track. *Goewey v. Urig*, 18 Ill. 241; *Davis v. Easley et al.* 13 id. 192.

If the street was used by appellant in common with others, or with the public in general, it can not be regarded as hostile to others. *Truesdale v. Ford*, 37 Ill. 212; *Chicago and Northwestern Ry. Co. v. City of Elgin*, 91 id. 251; 61 id. 241; *I. P. and C. R. R. Co. v. Ross*, 47 Ind. 25.

The street in question being a public highway, and used by the public for general purposes of travel, the appellant could not acquire exclusive possession, as contemplated by the statute, and adverse to the true owner of the soil—namely, Reich or the State of Illinois. *Parker v. Inhabitants of Framingham*, 8 Metc. 260; *Truesdale v. Ford*, 37 Ill. 210; *Jackson et al. v. Berner*, 48 id. 203; Tyler on Ejectment, pp. 865, 883, 884; *Briggs v. Inhabitants of Marshfield*, 13 Pick. 240.

Railroads in public highways, without authority, are a nuisance *per se*, and continue such. 1 Dillon on Mun. Corp.

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520, note; 1 Redfield on Railroads, 322; *Milhan v. Sharp*, 27 N. Y. 612; *Commonwealth v. N. and L. R. R. Co.* 2 Gray, 56.

Appellee being specially damaged thereby, may recover. *Milhan v. Sharp*, 27 N. Y. 627; *Lansing v. Smith et al.* 4 Wend. 10; Wood on Nuisance, 647; *Park v. C. and S. W. R. R. Co. et al.* 43 Iowa, 636; *Haynes v. Thomas*, 7 Porter, (Ind.) 38; *Stetson v. Faxton*, 19 Pick. 147; *Venard v. Cross*, 8 Kan. 254.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The questions first arising upon this record requiring our consideration, relate to the exclusion of certain evidence offered by appellant, and rejected by the court.

Luther W. Crocker having testified that he was acquainted with the location of appellant's track in the town of Lake, that he had held in that town the office of overseer of highways, commencing about 1865 and continuing to the latter part of 1867, and that as such overseer it was his duty to repair roads and bridges, was asked by appellant's counsel: "As such overseer, state whether you regarded Stewart avenue as being a public highway for repairs to be made by you, as such overseer?" This was objected to by appellee's counsel, and the objection sustained. Appellant's counsel then said: "I offer to prove by this witness, that as overseer of highways he did not regard Stewart avenue as being a public highway to be repaired by him." The court held the proposed evidence incompetent, and the counsel excepted.

Albert Colvin testified, among other things: "While I was a member of the board of assessors of the town, I don't think that portion of Stewart avenue occupied by the tracks was ever used for any other purpose only as railway tracks,—only for right of way for tracks. That was the general understanding and impression among the officers of the town for a number of years,—that has been their impression from

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about the time the town organized under a charter." The testimony of the witness as to the understanding and impression of the officers of the town was objected to by the counsel for appellant, and he moved to have the same stricken out, which motion the court sustained.

Josiah Gray was asked this question: "State whether it will be necessary, in the near future, to use the four tracks now on Stewart avenue solely for the running of freight and passenger trains thereon?" This was objected to by counsel for appellee, and the objection was sustained by the court. The counsel then proposed to prove by the witness that the demand of the business then required the use of those two side-tracks for main tracks, and that very soon they will be converted into main tracks, and further use for storage of cars be entirely dispensed with. Counsel for appellee objected to the reception of such evidence, and the court sustained the objection. The same witness was also asked what he had heard the officers of the road say on this subject, which was also objected to, and objection sustained by the court; and he was then asked what increase of the facilities for stocking cars was then being made by appellant in the vicinity of Forty-seventh and Fifty-ninth streets, and this also was objected to by counsel for appellee, and the objection sustained by the court.

To each of these rulings proper exception was taken, and they are now, in argument, claimed to be erroneous, and to authorize a reversal of the judgment.

The position is wholly untenable. The witnesses were not experts, and it was for them to state facts only, and for the jury to draw conclusions from those facts. Whether a thoroughfare is used, and how used, worked upon by public authorities, or abandoned, depends on certain facts only, and not on the opinions of witnesses. So, also, the use made of the street by appellant is an existing fact. What use ought to be made of it in the future, is matter of opinion about

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which different men might have different notions—a mere matter of speculation. What the officers of the road said as to the intended future use, is doubly objectionable,—it is mere hearsay, and that, too, in regard to a matter of opinion. Had appellant, through its board of directors or other proper officers, actually directed a particular use of the street in the future, that would doubtless have been competent evidence; but this was not the effect of the evidence excluded. The court heard all the evidence of facts that was offered, and its ruling in the respect under consideration is free of all objection.

The next question raised in argument is, did the court err in rejecting certain propositions of law presented by counsel for appellant. By agreement of parties the cause was tried by the court without the intervention of a jury. By sec. 41 of the Practice act, (Rev. Stat. 1874, p. 780,) it is provided: "In all cases, in any court of record of this State, if both parties shall agree, both matters of law and fact may be tried by the court, and upon such trial either party may, within such time as the court may require, submit to the court written propositions, to be held as law in the decision of the case, upon which the court shall write 'refused,' or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except, as to other opinions of the court." The propositions were submitted pursuant to this provision, and are, therefore, properly before us for investigation.

The first proposition refused is as follows: "The defendant received authority from the State of Illinois to lay and operate its tracks upon and along Stewart avenue, so-called, opposite to plaintiff's said lot, and the manner in which the evidence shows that authority has been exercised gives the plaintiff no right of recovery in this case, unless thereby some physical injury has been done to said premises, or unless the plaintiff has shown a right of recovery under the sixth count of his said declaration."

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The Pittsburg, Fort Wayne and Chicago Railroad Company was formed by consolidation between the Ohio and Pennsylvania Railroad Company, the Ohio and Indiana Railroad Company, and the Fort Wayne and Chicago Railroad Company, on the 6th day of May, 1856. These several corporations were organized under special charters granted by the States of Pennsylvania, Ohio, Indiana and Illinois, respectively, and the consolidation was authorized by the necessary legislation of each of these States.

The charter of the Fort Wayne and Chicago Railroad Company, granted by this State, by its fifth section provided: "The said company are hereby authorized to use and exercise all the powers for appropriating and obtaining the rights of way for the construction, maintenance and use of said road, that are given and expressed by the act entitled 'An act to provide for a general system of railroad incorporations,' approved November 5, 1849; and in case any lands so appropriated shall not be donated to the company, or in case of disagreement between the owner thereof and said company as to the fair value thereof, the sum to be paid shall be determined in the manner prescribed by said act." And the ninth section of such charter is as follows: "The said company are hereby authorized to construct their road upon or across any stream or water course, road or highway, railroad or canal, which the route of its road shall intersect; but the corporation shall restore the stream or water course, road or highway, railroad or canal, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness."

The portion of the act of November 5, 1849, supposed to bear upon the question before us, is from section 26, and is as follows: "If any such corporation shall, for its purpose aforesaid, require any land belonging to the people of this State, or to any of the counties or towns, the General Assembly of the State, and county or town officers, respectively,

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having charge of such lands, may grant such lands to such corporations for a compensation which shall be agreed upon between them, and if they shall not agree upon a sale and price, the same may be taken by the corporation as before provided in respect to other cases."

The board of commissioners of highways of the town of Lake, by an instrument made and acknowledged on the 17th of May, 1858, purported to grant, convey and quitclaim to the Pittsburg, Fort Wayne and Chicago Railroad Company, the use, for its railroad, "of the right of way over, across and along the street sometimes called 'Stewart avenue,' or 'School street,' extending north and south through the centre of the section," etc., and to "authorize, permit and allow the said company to lay its track or tracks, side-track, switches and turn-outs, in and along said street, avenue or public highway, and to operate, maintain and run its locomotives and cars over the same, and to continue to use and occupy the same, or so much thereof as may be necessary for the purpose of the business of the said railroad, forever."

Two questions are thus presented, growing out of the refusal of the court to hold the foregoing proposition of law:

First—Was the right to appropriate the entire use of Stewart avenue conferred upon the railroad company by the charter of "The Fort Wayne and Chicago Railroad Company?"

Second—If not, did the purported deed of the board of commissioners of highways of the town of Lake confer such right of use?

The ninth section of the charter of the Fort Wayne and Chicago Railroad Company is the only section that assumes to expressly confer power upon the company to construct its road along a highway; but it will be observed this explicitly requires the corporation to restore the highway to "its former state, or in a sufficient manner not to have impaired its usefulness." This is but equivalent to allowing a joint use by

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the railroad company for its road and by the public for an ordinary highway, of the avenue, but specially protecting its use as an ordinary highway against any impairment. The quotation from section 26 of the act of November 5, 1849, clearly has no reference to highways. It relates to "land belonging to the people of this State, or to any of the counties or towns,"—that is to say, land which belongs to the people, counties or towns, as owner, and not such whereof the nominal title only is held in order that a prescribed public use of the land may be enforced. That this is the intention, is put beyond doubt by the fifth clause of section 21 of the same act, which, in prescribing the powers vested in the corporation, uses this language: "To construct their road upon or across any stream of water, water course, road, highway, railroad or canal, which the route of its road shall intersect; but the corporation shall restore the stream or water course, road or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness." Since here is express authority for laying tracks upon, as well as across, streets or highways, carefully guarded so as to protect the public necessities, it would be absurd to suppose that the legislature intended to enact another section on the same subject, but without at all guarding the public necessities. And this view is still further strengthened by reference to section 25, which authorizes the company to acquire additional lands, where a change in the line of the highway becomes necessary by reason of an embankment or cutting for the railroad, thus showing that it was constantly in mind to preserve the highway for public use as an ordinary highway. Although, in a general sense, highways or streets, where the fee is in the State or a municipal corporation, are lands belonging to the people of the State, or to the municipal corporation, they are in legislation universally, so far as we recall, referred to as "highways," or "streets," and not as public lands. The ownership, in reality, in such cases, is

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but nominal, and entirely subordinate to the public trust for which the title is held. See *Chicago v. Rumsey*, 87 Ill. 348.

It results, then, that while, under its charter, the railroad corporation may doubtless have had the right to lay its tracks in Stewart avenue, that right was not an exclusive one, and could only be enjoyed in common with the use of the avenue by the public as an ordinary highway, and without materially impairing its usefulness as such. The commissioners of highways of the town of Lake had no title in this avenue, and no authority whatever to barter or convey any interest therein. They were invested with the care and superintendence of highways, and it was their duty to take measures to open and keep them in repair, alter and discontinue them under certain circumstances, to cause obstructions to be removed, etc.; but no title was vested in them in regard to the highways, and they had no power to make conveyances for any purpose. (See 2 Purple's Stats. p. 1156, title "Tp. Organization," art. 22.) Their deed was therefore a nullity. How far it might be considered as a circumstance on the question of equitable estoppel, in regard to the tracks laid down in 1858, under the authority of *Chicago, Rock Island and Pacific R. R. Co. v. Joliet*, 79 Ill. 25, *Chicago and Northwestern R. R. Co. v. The People ex rel.* 91 id. 251, and *Martel v. East St. Louis*, 94 id. 67, we need not now consider, since such estoppel could, in any view, only apply to those tracks, and could not be held to authorize the laying of the two additional tracks in 1874. Besides this, the deed is not used for the purpose of proving, with other evidence, such an estoppel.

Counsel, however, contend that authority for the execution of this instrument may be found under provisions in sec. 2 of "An act to perfect the title of the purchasers of the Pittsburg, Fort Wayne and Chicago railroad, and to enable them to form a corporation, and defining the powers and duties of

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said corporation," approved February 8, 1861. The language of that section, supposed to be pertinent, is as follows: "And the said corporation shall also possess all the faculties, powers, authorities, immunities, privileges and franchises at any time held by the said Pittsburg, Fort Wayne and Chicago Railroad Company, or by any of the corporations heretofore consolidated into the said company, or conferred on the said company, the said corporations, or either of them, by an act or law of this State, or of either of the States of Ohio, Indiana or Pennsylvania, and shall have power and capacity to hold and exercise within each and every of the said States, and, so far as it may be deemed necessary to the general objects of its business, within any other of the United States, all the said faculties, powers, authorities, privileges and franchises, and all others which may hereafter be conferred upon it by or under any law of this State, or of any of the aforesaid States, and to hold meetings of stockholders and directors, and do all corporate acts and all things within any of the aforesaid States as validly as it might do the same within this State, and may consolidate with any corporation of said other States authorized to hold, maintain and operate the aforesaid railroad."

But this was enacted near three years after the purported deed of the commissioners was executed, and does not assume to have any retroactive effect for the purpose of validating titles to right of way. Indeed, we think it quite clear that it has not the slightest reference to the mode of acquiring the right of way. It relates purely, as the language unmistakably shows, to the faculties, powers, authorities, privileges and franchises which may be deemed necessary to the general objects of its business within any other of the United States. It relates to the corporation itself, and is designed to make it a unit in each and all of the States in which its line is located, but it does not assume to affect the local law in regard to the mode of acquiring title to right of way. It

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has the same power and capacity to take and hold right of way in this State that it does in the other States, but the mode of acquiring right of way is obviously very different from the capacity to take and hold it. The control of streets, and the mode of regulating their use, and the mode of executing and acknowledging deeds and effecting condemnations, are matters of local law, affected, to some extent, by local constitutions, which it would doubtless be impossible to place under precisely the same law in each of these four States. At all events, we feel quite confident no such attempt has been here made. The provisions of the statutes of the other States can, therefore, have no bearing on the present question.

But counsel make the further point that the deed of the commissioners is color of title, and, being followed by possession and payment of taxes, bars appellee's action. To make a colorable title there must be a party grantor, as well as grantee. (See *Bride v. Watt et al.* 23 Ill. 507; *Brooks v. Bruyn*, 35 id. 392.) The commissioners of highways can not be parties grantors in a deed of conveyance. It may be conceded that if, under any imaginable state of case, they could be grantors, it is sufficient. But they can not be. Apart from this, however, their deed only conveys a use of so much of the street as may be necessary, thus, in effect, reserving what is not necessary for the use of the public. It would be a novel doctrine, if a railroad, by getting permission to lay a track in a street, could be regarded as holding the entire street adversely to the public. The use, here, was joint and mutual, not exclusive, and therefore not adverse. *Truesdale v. Ford*, 37 Ill. 210. And this will apply equally to the deeds made to Tilden and others, and by them to appellant. However effective they may be as to the right of way actually occupied by their tracks, they can not affect the part of the street not thus occupied, and which there was evidence tending to show was used and occupied by the public as an ordinary highway until the laying of the additional tracks in 1874.

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Again, counsel insist the title to the street was in the public. The first two tracks were laid in the street, under authority of law, before the constitution of 1870 took effect, and for that act there can be no recovery for damages not resulting from a direct physical injury to the appellee's property, on the authority of *Chicago v. Rumsey*, 87 Ill. 348, and *Chicago, Rock Island and Pacific R. R. Co. v. City of Joliet*, 79 id. 25. This may all be true, and still the proposition have been properly refused. The laying of the two tracks, as we have seen, could not have been, under the law, and the evidence tends to show was not in fact, an appropriation of the entire street. The public had a right to, and still used, the balance of the street. That balance appellant had no right to occupy. It did, in 1874, less than two years before suit was brought, occupy it by laying thereon two additional tracks, and, as the evidence tends to show, thereby completely excluded its use for ordinary street purposes, and on that side cut off appellee's access to his lot. The proposition assumes that the two tracks laid in 1874 were lawfully laid, which we hold could not, under the uncontroverted facts, have been true. It was properly refused.

What has been said disposes, also, of the objections on account of the refusal of the second, third, fourth and fifth propositions.

The eighth proposition was properly refused, because it excludes the idea that there can be a recovery under the first, second, third, fourth or fifth counts, by cutting off access to appellee's property. This we do not understand comes within the definition of "physical injury," as used in that proposition; yet this would be damaging the property, within the meaning of the present constitution, and constitute a ground of recovery. *Shawneetown v. Mason*, 82 Ill. 337.

The eleventh proposition was properly refused, because it contemplates setting off benefits to one piece of property against damages done to another and distinct piece. Lot 22

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of the school trustees' subdivision of section 16, had been divided into two separate tracts, by a street running through its centre from north to south, and the injuries sued for are such as have been sustained by the west half of lot 22, whereas the proposition is to offset benefits which have resulted to any part of lot 22—that is, benefits to the east half of lot 22, disconnected entirely from the west half of that lot. This has never been held admissible.

The fourteenth proposition was properly refused, because there was evidence tending to sustain a cause of action. It asserts, simply, that under the evidence there can be no recovery. There was evidence tending to authorize a recovery. Its weight was for the court.

The fifteenth and last proposition was properly refused, because it implies there can be no recovery for temporary injury, or for preventing access to appellee's property by way of Stewart avenue.

We are not allowed to look into the evidence in this class of cases, as before observed, further than to see whether there is evidence tending to sustain the cause of action, the finding of the Appellate Court upon all controverted questions of fact being final. We are, therefore, to assume that Stewart avenue was by dedication a public highway or street; that by the laying of the two additional tracks in 1874, the use of the avenue for all ordinary purposes of a highway or street is entirely destroyed; that thereby all access to appellee's lot from that side is cut off; that stock cars have been permitted to stand in the avenue, adjacent to that lot, creating a nuisance, and that appellee has been otherwise injured in the use and enjoyment of his property. Clearly, this would authorize a recovery for some amount, and the question of what amount is not before us. Motion for new trial was made, and causes therefor assigned in writing, but it was not therein alleged that the damages are excessive. Errors were assigned in the Appellate Court, but

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no error was therein assigned on the ground that the damages are excessive.

In *Emory v. Addis*, 71 Ill. 273, we held, when excessive damages are not assigned as a ground for a new trial in the circuit court, nor for error in this court, the appellant is not in a position to have the question reviewed; and in *Thayer v. Beck*, 93 Ill. 357, we held, if a defendant fails to assign for error in the Appellate Court that the judgment was too large, he would not be allowed to present that question in this court. There was also like ruling in *Diversey v. Johnson, Admx.* 93 Ill. 547; *Page et al. v. People ex rel. etc.* 99 id. 418; *Litchtenstadt v. Rose*, 98 id. 643.

Perceiving no cause to disturb the judgment of the Appellate Court, it is affirmed.

Judgment affirmed.

MR. JUSTICE DICKEY: I do not concur in the above.

ROBERT WALSH *et al.*

v.

ELIZABETH WRIGHT.

Filed at Ottawa November 10, 1881.

1. **WITNESS—competency of party.** The exception in favor of heirs, in the statute making parties in interest competent to testify, was made for the benefit of the heirs themselves, and not for the benefit of strangers who are in nowise identified in interest with them.

2. On bill for the specific performance of a parol contract for the sale of land against a minor heir of the alleged vendor, the adult heirs having conveyed, and also to set aside a sheriff's deed to another, made on a sale under execution issued upon a judgment recovered after the sale to the complainant, and possession taken, the suit was dismissed as to the minor heir, and a hearing had as against the holder of the sheriff's deed: *Held*, that the complainant was a competent witness, after such dismissal, as to the minor heir, no relief being thereafter sought as against the heir.

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Statement of the case.

3. *PRACTICE—time for objecting to secondary evidence.* It is well settled that secondary evidence may always be received upon the trial of an issue, unless objected to on that ground at the time it is given or offered, so that the objection may be obviated by further testimony. The objection to such testimony can not be taken for the first time in a court of review.

4. *PLEADING AND EVIDENCE—variance.* A bill by a purchaser of land to set aside a sale under judgment and execution against one of the vendors, alleged that the complainant bought from two persons who were the owners, and the proof showed that the negotiation for the purchase was made with only one of them, who was at the time the agent of the other, for whom he acted, as well as for himself, in making the sale, and who sent the other his share of the purchase money, and which other owner afterwards conveyed his interest to the one making the sale, to enable the latter to carry the contract into execution: *Held*, that there was no such variance, but even if there had been, it would not have been material, as the bill did not seek a specific execution of the contract.

5. *NOTICE—possession of land as to party's equity.* Actual possession of land under a parol or unrecorded contract of purchase, before the recovery of a judgment against the vendor, is notice to the judgment creditor, and all persons claiming under him, of the purchaser's rights.

6. *CLOUD UPON TITLE—sheriff's deed.* Where the purchaser of land takes actual possession, and makes payment of the purchase money before the recovery of a judgment against the vendor, a subsequent sale of the property under the judgment, and a sheriff's deed to the assignee of the creditor, will be set aside as a cloud upon the title of the purchaser.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Elizabeth Wright, on the 29th day of April, 1878, exhibited in the Will circuit court her bill in chancery, against Ellen McIntyre, Charles Hammond, John Gray, and Henry Prepenbrink, as sheriff, praying for the specific performance of a parol contract for the purchase of a tract of land alleged to have been made between complainant, the purchaser, and the said Hammond and Archibald McIntyre, the ancestor of the said Ellen McIntyre, and also for other relief. Subsequently an amended supplemental bill was filed in the cause, making Robert Walsh a party.

The supplemental and amended bill alleges that complainant purchased the tract of land in question of McIntyre

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and Hammond, on or about the first of April, 1864; that the amount agreed to be paid was \$950, with interest at ten per cent per annum; that she was to have her own time in which to make payment, so long as the interest was paid on the unpaid purchase money; that upon payment the vendors were to make her a good and sufficient deed to the premises; that this contract was in writing, but had been lost, and was never recorded; that soon after the purchase she paid \$250, and immediately went into possession, and from thence up to the time of filing her bill she has been in the actual, open and visible possession of the same, and has made valuable improvements thereon, amounting to the sum of \$500 and upwards; that on or before the 1st day of September, 1872, she had paid Hammond the full amount due him on the land, and demanded a deed for his interest; that on the 26th day of February, 1876, Hammond and wife made to McIntyre a quitclaim deed to the premises, and the same was duly recorded; that at the date of this deed complainant had not fully paid McIntyre for his interest in said premises, and upon being informed of Hammond's conveyance to McIntyre, the latter informed complainant it had been done for her benefit, and that as soon as her payments were completed he would convey to her; that McIntyre, without having made such conveyance, died, leaving a widow and four adult children, all of whom have since conveyed their interest in the premises; that the said Ellen, his remaining child, has not conveyed, by reason of her minority; that after Hammond had been fully paid for his interest in the land, to-wit, on the 2d of January, 1874, John Gray commenced a suit in the Will county circuit court against Hammond, and subsequently, on the 18th of February following, recovered a judgment against him in that proceeding, under which the land in controversy was sold, and purchased by Gray, as the property of Hammond; that Gray, for the purpose of defrauding complainant, without consideration, assigned the

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certificate of purchase to Walsh, who subsequently received a sheriff's deed for the premises, and is threatening to oust complainant therefrom, etc., and prays, among other things, that said deed be set aside and surrendered as a cloud on her title.

The bill was dismissed as to Prepenbrink, Hammond and Ellen McIntyre, and the case proceeded to a hearing upon the merits as to the other parties, resulting in a decree setting aside, and declaring inoperative and void, the sheriff's deed to Walsh, and directing the same to be delivered up for cancellation, to reverse which decree the present appeal is prosecuted.

Messrs. HALEY & O'DONNELL, for the appellants.

Messrs. MUNN & MUNN, for the appellee.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

A reversal of the decree in this case is urged on several grounds, none of which go strictly to the merits of the controversy.

It is urged, in the first place, the court erred in considering the testimony of the complainant, Elizabeth Wright, on the ground that her evidence would not have been competent as against Ellen McIntyre had she been continued as a defendant in the case, for the reason Ellen was defending as heir, and it is insisted that the witness' competency can not be restored by dismissing the bill as to Ellen, and in support of this position the case of *Alexander v. Hoffman*, 70 Ill. 114, is cited. We do not regard that case as sustaining the position of appellants. It is neither in principle nor in its facts like the present case. In that case the assignee of an alleged contract of purchase was seeking to enforce it against the heirs of the alleged vendor without making the original purchaser and assignor of the contract a party, and it was

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held that the assignor of the contract was a necessary party, and that he was not a competent witness as against the heirs. In that case the interests of the complainant and of the omitted party who was held incompetent to testify, were identical, and directly antagonistic to the interests of the heirs of the alleged vendor. In the present case, after dismissing the bill as to Hammond, Ellen McIntyre, and the sheriff, the whole object and purpose of the bill was to have the sheriff's deed set aside as a cloud upon the title of complainant,—a matter in which Ellen McIntyre had not the slightest interest. The complainant, as alleged in the bill, and clearly shown by the proofs, already had both the legal and equitable title to four-fifths of the property, and the sheriff's deed to Walsh was clearly a cloud upon her title to that extent, and so far as this deed was a cloud upon her title, was a matter in which, as just stated, Ellen did not have the slightest interest. Had the bill, as amended, sought to enforce a specific performance of the contract as to the remaining fifth of the estate, the legal title of which is still in Ellen, or if the bill, as amended, had sought in any manner to affect the original contract under which appellee claims the remaining fifth of the land, for which she has as yet received no deed, why, to that extent the present suit would have been adverse to Ellen, and in that event appellee would not have been a competent witness against her; but nothing of that kind is sought by the bill as finally amended, and neither Ellen, as heir, nor any one identified in interest with her, is complaining of appellee's testimony. There is no community of interest between appellants and Ellen, and her interests are not at all affected by the decree from which this appeal is prosecuted. The exception in favor of heirs, in the statute making parties in interest competent to testify, was inserted for the benefit of the heirs themselves, and not for the benefit of strangers who are in no manner identified in interest with them. We do not think this objection to the decree is well taken.

♦

Opinion of the Court.

It is also objected that the court erred in permitting Elizabeth Wright to testify to the terms of the contract with McIntyre and Hammond, without having sufficiently accounted for the loss of the written contract. There are several answers to this objection, one of which is sufficient. Upon looking into the record itself, we find that the testimony of Mrs. Wright was taken before the master, and reported by him to the court, and that when her deposition was offered upon the hearing no specific objection was made to her testimony on the ground now suggested, and there was not, therefore, and could not have been, any ruling of the court upon it which can now be assigned for error. There was a general objection on the hearing to the competency of this witness, which we have just considered. There was also a general objection to her answers to interrogatories 6, 13, 14, 22 and 23, and these were the only objections raised to her testimony. The answers to interrogatories 6, 13 and 14, the only ones having any bearing on the question in hand, were excluded by the court. Thus it will be seen there is no foundation in fact for the error now complained of. It is well settled that secondary evidence may always be received upon the trial of an issue, unless objected to on that ground, and the law does not suffer parties to sit by and permit evidence of this character to be received on the trial without objection, and afterwards, for the first time, take advantage of it in a court of review. To permit this would be highly unjust to the opposite party, for where the objection is made in the court below, it affords the opposite party an opportunity of meeting the objection by further testimony.

It is further objected that there is a variance between the allegations and the proofs with respect to the parties from whom the purchase was made. It is claimed that while the bill charges that complainant bought it from McIntyre and Hammond, complainant swears that she had nothing to do

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with Hammond in the purchase of the land, and Hammond swears that when he conveyed to McIntyre, he understood he was selling his interest to him. This may all be so, and still the purchase, in contemplation of law, may have been made from them both. It clearly appears that complainant was informed, at the time of the purchase, that Hammond had an interest in the land, as well as McIntyre, and it also further appears that the latter was, at the time, the general agent of Hammond with respect to this and other lands owned between them, and McIntyre evidently acted on behalf of Hammond, as well as himself, in making the sale to her, and sent him his share of the purchase money paid by her long before the Gray judgment was obtained, and she being in the actual possession of the premises was notice to Gray, and all persons claiming under him, of her rights.

But even if the variance existed, which we do not concede, still, under the bill, as amended, for reasons already stated, the variance can not be regarded as material. If complainant were seeking to enforce the specific performance of the contract in question as against appellants, then the objection, if true in point of fact, would be well taken; but such is not the case. As against appellants, complainant by her bill, as amended, seeks to have a cloud removed from her title to the land in controversy, which the bill and proofs clearly show in equity belong to her, hence it is a matter of no concern to appellants whether the original contract was technically with McIntyre and Hammond, or whether McIntyre alone sold her the entire interest in the property, with the understanding that he would procure a deed from Hammond as soon as his interest was paid for, and under this arrangement she, through McIntyre, paid Hammond his share of the purchase money, and the latter, for the purpose of enabling McIntyre to convey to her, conveyed the premises to him. In either view, we do not consider the objection well taken.

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These are the only objections made by counsel which we deem of sufficient importance to consider.

The merits of this case are so manifestly with appellee, the decree ought not to be disturbed on any mere technical ground which could not have prejudiced appellants.

Decree affirmed.

FREDERICK ALLMAN *et al.*

v.

EVA TAYLOR *et al.*

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146	253

Filed at Springfield March 31, 1881—Rehearing denied June Term, 1881.

1. DECREE—*conclusive collaterally, if the court has jurisdiction.* If a court has jurisdiction of the persons of the parties and of the subject matter of the suit, its decrees will be conclusive on all parties concerned; and the title to property acquired on a sale under a decree in such a case will be valid, notwithstanding irregularities may have intervened in the proceedings.

2. JURISDICTION—*of the persons of infants, through their guardian.* Minors, having the right to sue by their next friend, or guardian, will bring themselves within the jurisdiction of the court by invoking its aid through their guardian, in a proceeding brought in their interest and to protect their rights.

3. SAME—*of the estates of infants.* A court of equity, under its general powers, has jurisdiction over the estates of infants and others under disability, and may, on proper application, order the sale of an infant's unproductive lands to raise means for discharging an incumbrance on productive property in which it has a reversionary interest in fee, though the latter be situate in another State, where the bill seeking such relief shows that such a course is for the best interests of the infant.

4. JUDICIAL SALE—*not affected by errors in the proceedings.* If a court of general jurisdiction has jurisdiction of the parties, and of the subject matter of the litigation, no matter how erroneously it may thereafter proceed, within the bounds of its jurisdiction, its decrees will be conclusive until reversed or annulled in some direct proceeding, and the title to property acquired at a sale under such a decree, by a stranger to the record, will be upheld, although the decree itself may afterwards be reversed for manifest error. It is the policy of the law to maintain judicial sales.

Brief for the Appellants.

5. SAME—*purchaser not bound by improper application of proceeds of sale.* A purchaser of an infant's lands, under a decree in chancery in a case where the court has jurisdiction, is not bound to see to the application of the funds arising from the sale, nor that the guardian performs his duty under the decree, and a failure of the guardian in that respect will not vitiate the sale rightfully made at the time.

APPEAL from the Circuit Court of Champaign county.

Messrs. TIPTON & RYAN, for the appellants:

A minor may institute any kind of a proceeding in the courts of this State, either by his guardian or next friend. *Holmes v. Field*, 12 Ill. 424; *Gross' Stat.* 1868, p. 331, sec. 4; *McGuffin v. Storrs*, Cox, (N. J.) 72.

The wards were in court by their guardian, and this conferred jurisdiction of their persons. *Mason v. Waite*, 4 Scam. 133; *Gibson v. Roll*, 27 Ill. 387; *Fitzgibbon v. Lake et al.* 29 id. 177.

As to the jurisdiction of a court of chancery to order the sale of a part of the real estate of an infant, on his application by guardian or next friend, to pay off incumbrances on the residue, see *Smith et al. v. Sackett et al.* 5 Gilm. 534.

Where a court obtains jurisdiction of the persons and subject matter of the litigation, its judgment and decrees must be held valid, and an innocent purchaser at a sale under such judgment and decree will not be affected by any error in the course of the proceedings. *Johnson et al. v. Johnson*, 30 Ill. 215; *Spring v. Kane*, 86 id. 580; *Conover v. Musgrove et al.* 68 id. 58; *Fitzgibbon v. Lake*, 29 id. 177; *Young v. Lorain*, 11 id. 637.

Every presumption runs in favor of the jurisdiction of the court of general jurisdiction. *Wills v. Mason*, 4 Scam. 88; *Whitney case*, 23 Ill. 447; *Vance v. Frank*, 2 Scam. 264; *Beaubien v. Brinckerhoff*, id. 273; 1 Sandf. 74; *Kenney v. Grier*, 13 Ill. 448; *Horton v. Crichfield*, 18 id. 136.

The judgments of courts of general jurisdiction are always held conclusive in collateral proceedings until the same are

Brief for the Appellees.

reversed upon direct proceedings had for that purpose. *McCoy v. Morrow*, 18 Ill. 594; *Cody v. Hough*, 20 id. 46; *Prescott v. Fisher*, 22 id. 393; *Ralston v. Wood*, 15 id. 170; *Williams v. Amroyd*, 7 Crand. 423; *Ex parte Watkins*, 3 Pet. 207; *Grignon's Lessees v. Astor*, 2 How. 342; *Forniquet v. Perkins*, 7 id. 172; *West v. Smith*, 8 id. 412; *Sargent v. State Bank of Indiana*, 12 id. 385; *United States v. Arrendo*, 6 Pet. 729; *Perkins v. Fairfield*, 11 Mass. 227; *Iverson et al. v. Loberg*, 26 Ill. 179; *Gibson v. Roll*, 27 id. 92; *Field v. The People*, 3 Scam. 108; *Rockwell et al. v. Jones et ux.* 21 Ill. 285; *Vorhees v. Bank of the United States*, 10 Pet. 471; *Huff v. Outchison*, 14 How. 588; *Thompson v. Tolmie*, 2 Pet. 165.

The rule is, that where the circuit court has jurisdiction, and makes an order of sale, the fact that the guardian may proceed irregularly in the execution of the decree will not invalidate the sale. *Mulford v. Beveridge et al.* 78 Ill. 456.

Nor is the purchaser responsible for a misapplication of the purchase money. *Mulford v. Beveridge*, 78 Ill. 456; *Mumford v. Steinback et al.* 46 id. 309.

Nor is he responsible for the order of the court in appropriating the money realized from the sale. *Fitzgibbon et al. v. Lake et al.* 29 Ill. 165.

Mr. J. O. CUNNINGHAM, also for the appellants.

Mr. FRANCIS M. WRIGHT, for the appellees :

1. That complainants below had the right to maintain the bill to impeach and avoid the former decree, counsel cited *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Lloyd v. Malone*, 23 id. 43; *Hess et al. v. Voss*, 52 id. 472.

2. In the original proceedings, the decree in which is sought to be impeached, the court had no jurisdiction, either of person or subject matter, and such decree is therefore void.

The court must have jurisdiction, by notice, and necessary averments in the petition of the jurisdictional facts. *Smith*

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et al. v. *Race*, 27 Ill. 387, and cases there cited; *Fitzgibbon v. Lake*, 29 id. 165; *Johnson v. Johnson*, 30 id. 223.

The statutes in force at the time the petition was filed authorize the land to be sold for the purpose of educating or supporting such infant, or for the purpose of investing the proceeds of such real estate in such manner as the court which appointed such guardian may order and direct. Gross' Stat. (1st ed.) 335, or Laws 1853, p. 98.

The court could acquire no jurisdiction without notice of the application by the guardian. *Spellman et al. v. Douse*, 79 Ill. 66; *Mulford v. Beveridge*, 78 id. 455; *Nichols v. Mitchell*, 70 id. 258; *Knickerbocker v. Knickerbocker*, 58 id. 399.

The power of the court in this regard is purely statutory. *Whitman v. Fisher*, 74 Ill. 154; *Donlin v. Hettinger*, 57 Ill. 348; *Rogers v. Dill*, 6 Hill, 415; *Onderdonk v. Mott*, 34 Barr, 106; *Becker v. Lorillard*, 4 Conn. 207; *In re Turner*, 10 Barb. 552.

MR. JUSTICE SCOTT delivered the opinion of the Court:

While this bill may not be susceptible of any exact definition, it may be treated, as complainants themselves have treated it, as a bill to impeach a former decree pronounced by the circuit court, in a case wherein these complainants were petitioners or complainants.

In 1866 a proceeding was commenced in the circuit court of Champaign county, in the names of the present complainants, by Benjamin F. Brown, their guardian, to sell the lands now involved in this litigation. It was represented to the court by the allegations of the bill, complainants were all minors, resident in the State of Indiana; that Benjamin F. Brown was their guardian, duly appointed by a court having jurisdiction for that purpose; that they were the sole owners of the lands described as being situated in Champaign county, in this State; that they also had a reversionary interest in a

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lot, with improvements, situated in the city of Indianapolis, in which their mother had a life estate; that the property in Indiana was subject to incumbrances that would ultimately destroy the title unless removed, and that neither complainants, nor their mother, who owns the life estate, had any means other than the property described, with which to remove such incumbrances. The prayer of the bill was, that the Illinois lands, which were then unimproved and of course unproductive, might be sold, and the proceeds used to protect the other property in which they had an interest. Allegations contained in the bill gave the court to be informed that such a course would be greatly to the advantage of the minors, invoking its aid. All persons interested in these lands were complainants, by their guardian, and to the proceeding Mary E. Taylor, their mother, was made defendant. No process was issued, as the party named as a defendant came into court and made answer, admitting and confessing the matters set up in the bill. On the hearing of the cause some evidence that had been taken by *ex parte* affidavits was heard, and the court decreed according to the prayer of the bill. It was under that decree the lands were sold by the master in chancery to John Reynolds, for \$2000, to whom he made and delivered a deed for the same. The report of the master showing the making of the sale and deed, was afterwards approved by the court, and the proceeds of the sale, when collected, after deducting necessary expenses, were paid over to the guardian of complainants, as the decree provided. Afterwards, Reynolds conveyed a portion of the lands to defendant Burns, and the residue to defendant Allman, each of whom entered into possession of the lands respectively conveyed to him, and has since made valuable improvements thereon. It is the decree rendered in that proceeding that complainants in this bill seek to impeach, and the specific relief asked is, that the master's deed to Reynolds, and his deeds to defendants now claiming to own the lands, be set

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aside, and be declared to be absolutely void. The decree of the circuit court was in conformity with the prayer of the bill, and defendants were required to surrender possession of the lands to complainants. The writ of error on which the case is to be heard in this court was sued out by defendants in possession and claiming to own the lands.

All discussion of minor questions will be waived, and our inquiry will be directed to ascertain whether the court that pronounced the decree sought to be impeached, had jurisdiction of the cause. It is a familiar principle, that needs the citation of no authorities in its support, that if a court has jurisdiction of the persons of the parties, and of the subject matter of the suit, its decrees will be conclusive on all parties concerned, and the title to property acquired on a sale under a decree in such a case will be valid, notwithstanding irregularities may have intervened in the conduct of the proceedings. Defendants claim title to the property involved under a sale by virtue of a decree of a court of general jurisdiction, and it only remains to ascertain whether the court has jurisdiction in this particular case to pronounce the decree it did.

There is no pretence the original proceeding under which defendants claim title to the lands conforms to the statute of this State which provides for the sale of lands of minors by guardians, and if it can be maintained at all, it must be as a chancery proceeding deriving no aid from the statute. It was commenced by what has the form and general characteristics of a bill in chancery, was placed on the chancery docket, and was treated by the court as a bill in chancery. The decree follows the usual practice, and provides it shall be executed by the master in chancery, as was done. It was a proceeding friendly to the interests of the minors, invoking the aid of the court, and was brought by their guardian, appointed by a court of competent jurisdiction, on whom devolved the special duty of protecting their interests, and for that purpose was invested with ample powers. It

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was represented to the court it was to the advantage of the minors, complaining by their guardian, that the property situated in Indiana, in which they had the reversionary interest, was improved property, was valuable, and was bringing in quite an annual rental, besides furnishing a home for their mother, with whom they resided, and that the income from that source would aid materially in their maintenance, and that the Illinois lands were unimproved and unproductive; that it would be greatly to their interest that the Illinois lands should be sold, and the proceeds used to remove incumbrances from the Indiana property, that they might continue to enjoy it, as they had done, for their support. On the evidence submitted the court found the facts substantially as stated in the bill, and accordingly decreed relief.

No reason is perceived why a court of chancery would not lend its aid in a case where the facts are as they appear from this record. Minors may sue in this State, either by their next friend, or by guardian. Having a right to sue by guardian, as they did, complainants in the original case brought themselves within the jurisdiction of the court by invoking its aid. Of this there can be no doubt. It is plain the court had jurisdiction of the subject matter of the suit. This is not an entirely new question in this court. In *Smith v. Sackett*, 5 Gilm. 534, it was said: "The jurisdiction of a court of chancery to order the sale of the whole or a portion of the estate of an infant, or to order it incumbered by mortgage whenever the interests of the infant demand it, will not be denied, whether that interest be of a legal or equitable estate." Conforming to this view of the law is the recent case of *Dodge v. Cole*, 97 Ill. 338, where it was held a court of chancery, under its general powers over the estates of infants, lunatics or distracted persons, had jurisdiction to order the sale of a lunatic's land for her support and maintenance, on proper application by her conservator, or to pay the conservator for moneys expended by him in supporting such ward. On the

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principle declared in these cases, which may be regarded as settling the law in this State on the questions discussed, relief was granted in the original case, and which decree this court is now asked to review. As we have seen, it was represented to the court, and it so found from the evidence, it would be for the interest of these infants to sell their lands in Illinois to relieve the property in Indiana, in which they had an interest, from the incumbrances resting upon it. It may be, and is doubtless, true, the court found incorrectly on the question submitted, but that did not in any manner affect the jurisdiction of the court. No principle is better settled than where a court once obtains jurisdiction of the persons of the parties, and of the subject matter of the litigation, no matter if it may thereafter erroneously proceed, within the bounds of its jurisdiction, its decrees will be conclusive until reversed or annulled in some direct proceeding known to the law. The title to property acquired at a sale under such a decree by a stranger to the record will be upheld, although the decree itself might afterwards be reversed for manifest error. It is and has been the policy of the law, to maintain judicial sales, and in this policy the public interest is best subserved. *Whitman v. Fisher*, 74 Ill. 147.

It has already been noted, the proceedings in the original case, now called in question, were not adverse to the interests of the minors. The sale decreed was adjudged to be for their best interests, although the court may have greatly misapprehended the necessity for the sale of their lands. The case is not, therefore, within the rule declared in *Whitman v. Fisher*, *supra*, cited with so much confidence by counsel for complainants. The proposition stated in that case is, that a court of equity has no original jurisdiction to order the sale of real estate to pay debts, or for any other purpose, so as to bind the infant's legal estate. That doctrine has for its support the best authorities, and it is not intended to question its correctness, but that was a proceeding adverse to the inter-

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ests of the infants owning the estate. Here the proceeding was in their behalf, for the apparent purpose of protecting the infants' estate. Appropriating a portion of the estate of an infant for the preservation of the residue, is in no just sense depriving such infant of its estate. Equity has always assumed jurisdiction to afford protection to the property of persons who, by reason of some disability, are unable to protect their estate for themselves. That is precisely what was intended to be done in this case, and although the purpose contemplated failed, the court acted within the bounds of its jurisdiction. Had the result been different, it is hardly probable any complaint would have been made that the court exceeded its rightful jurisdiction in decreeing the sale of the petitioning infants' lands.

The fact the guardian may not have applied the proceeds of the sale of complainants' lands in conformity with the decree of the court, is not a material question in this case. The evidence tends to show the proceeds of the sale were appropriated, in part at least, to the purposes mentioned in the decree, and for the maintenance of complainants during their minority. But be that as it may, the purchasers were not bound to see to the application of the funds arising from the sale of the lands to them, nor that the guardian performed his duties under the decree, and a failure of the guardian in that respect did not, and could not, vitiate the sale to them. *Mulford v. Beveridge*, 78 Ill. 455.

The decree of the circuit court will be reversed and the bill dismissed.

Decree reversed.

Syllabus.

N. N. WINSLOW *et al.*

v.

T. J. NOBLE *et al.**Filed at Springfield Sept. 30, 1881—Rehearing denied January Term, 1882.*

1. **HOMESTEAD—what indebtedness is for purchase money.*** Where a party exchanged land on which there was an incumbrance, for another tract, agreeing to discharge the incumbrance, and taking a deed in which a lien was reserved to secure the performance of such agreement, and afterwards borrowed money with which to relieve the land so given by him in the exchange, from the incumbrance, giving a mortgage on his own land to secure its repayment, it was *held*, that the money so borrowed was in no sense purchase money of the land mortgaged by him.

2. **SAME—enforcing in equity, party must do equity.** Where the owner of land which had been sold on foreclosure of a mortgage which failed to release the homestead, induced another to purchase the land by taking up the certificate of purchase, the time of redemption having nearly expired, and pay him the balance of the purchase money, \$400, and accepted a lease from such purchaser, but learning of the defect in respect to the release of the homestead refused to surrender possession to the purchaser, and filed his bill to enjoin the recovery of possession by forcible detainer, without paying back the \$400 received by him, it was *held*, that under the maxim, he who seeks equity must do equity, and come with clean hands, the complainant was not entitled to the relief sought.

3. **SAME—abandoned, by accepting lease of premises.** Where the owner of land sold on foreclosure against him, sells his interest to another, who procures an assignment of the certificate of purchase, and pays the balance of the price to such owner, and the latter, after a deed is made on the foreclosure sale, takes a lease of the person so purchasing, the accepting of such lease will be a surrender and abandonment of the premises, within the meaning of the Homestead act, and the former owner will have lost his homestead,

* Further as to claim for purchase money being protected as against the right of homestead, and what constitutes purchase money: *Weider v. Clark*, 27 Ill. 251; *Miller v. Marckle*, id. 402; *Eyster v. Hathaway*, 50 id. 521; *Best v. Gholson*, 89 id. 465; *Allen v. Hawley*, 66 id. 164; *Austin v. Underwood*, 37 id. 438; *Magee v. Magee*, 51 id. 500; *Bush v. Scott*, 76 id. 524.

Money borrowed of a third person and invested in the purchase of land, is not purchase money, within the meaning of our Dower law. *Jeneson v. Garden*, 29 Ill. 199.

The second section of the Homestead act of 1851 was intended to protect the vendor's lien. *Phelps v. Conover*, 25 Ill. 314.

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Opinion of the Court.

though not properly released in the mortgage under which the sale was made.

4. SAME—*former decision*. What was said in *Booker v. Anderson*, 35 Ill. 66, as to the effect of taking a lease under similar circumstances, can have no bearing now, as the statute under which that decision was given did not contain the clause found in the present statute, "or possession is abandoned, or given pursuant to the conveyance."*

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Mr. WM. E. HUGHES, and Mr. M. W. PACKARD, for the appellants.

Mr. H. G. REEVES, for the appellees.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Thomas J. Noble, and Sarah J. Noble, his wife, against Nathaniel N. Winslow, and Sarah L. Winslow, his wife, to enjoin them from prosecuting an action of forcible detainer, which was then pending before a justice of the peace, to recover possession of a certain tract of land in McLean county, consisting of $45\frac{90}{100}$ acres, which was then occupied by the complainants.

There is no substantial dispute between the parties in regard to the facts. Noble, as appears, a few years ago owned 160 acres of land in Piatt county, upon which he had given a trust deed to secure a certain amount of money which he owed to one Wing. This land he traded to John R. Stewart for 45 acres of land in McLean county—the land in dispute. In the trade Noble agreed to remove the mortgage on the Piatt county land, and Stewart reserved a vendor's lien on the 45 acres, to secure the performance of Noble's agreement. Noble moved on the land in McLean county, and thereafter he occupied it as a homestead. Noble failing to pay off the

* The case of *Buck v. Conlogue*, 49 Ill. 391, upon the same question, seems to rest upon *Booker v. Anderson*.

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mortgage on the Piatt county land, Stewart, at the request of Noble, found a man (Daniel Grow) who was willing to loan the money to be used for that purpose, and take a mortgage on the 45 acres of land. Noble and his wife agreed to give a mortgage releasing the homestead, to secure the money loaned by Daniel Grow, and a mortgage was prepared, executed and acknowledged; but the acknowledgment was defective in this, it failed to show that T. J. Noble acknowledged the release of the homestead. This defect was not, however, known by Grow or the Nobles. The money loaned not having been paid when due, Grow, in February, 1878, filed a bill in the McLean circuit court to foreclose the mortgage. The Nobles did not appear. A decree by default was rendered, and in May, 1878, the premises were sold, and bid off by Grow for the amount of his debt, and costs. In July, 1879, Noble, finding that he could not redeem the premises from the sale, went to appellant N. N. Winslow, and induced him to buy the place at \$50 per acre, which amounted to the sum of \$2250. There was then due Grow \$2000, but he agreed to throw off \$150. Winslow then paid him \$1850, and took an assignment of the certificate of purchase, and accounted to Noble for the balance of the purchase price of the land—\$400. Winslow had a deed made to his wife on the certificate of purchase, and as a part of the trade leased the premises to Noble from the 1st day of July, 1879, to the 1st day of March, 1880, for eight per cent on the amount he had paid for the property, and a written lease was executed by the parties. Before the expiration of the lease Noble discovered the defect in the acknowledgment of the mortgage, and refused to surrender possession of the premises, and upon being sued for possession filed this bill.

There is no controversy over the proposition that a homestead is not exempt as against a debt incurred for the purchase thereof. But the money Grow loaned Noble, for which a mortgage was taken, was not used in the purchase of the

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premises—it was in no sense purchase money. The fact that Noble may have used the money borrowed of Grow, to pay off a mortgage on the Piatt county farm, which he agreed with Stewart to pay, as a part of the trade under which he obtained the land in question, does not make the money obtained of Grow purchase money. Stewart sold the premises to Noble, but he received no part of the money Grow loaned Noble. The premises were purchased long before the Grow debt was made, and hence the Grow debt could not be incurred for the purchase of the premises.

Appellant Winslow filed a cross-bill, in which it was, in substance, alleged, that T. J. Noble acknowledged (before the notary who took the acknowledgment of the mortgage) the release and waiver of his homestead rights in and to the premises described in the mortgage, and that by a mere clerical error of the notary who drew the mortgage, the certificate of acknowledgment failed to state the truth in regard to the acknowledgment. The cross-bill prayed that the certificate of acknowledgment be reformed according to the truth. The complainants interposed a demurrer to the cross-bill, which the court sustained, and this is relied upon as error.

We shall not stop to determine whether the court erred in sustaining the demurrer to the cross-bill, or not, as a correct decision of the case must rest upon other grounds, which will dispose of the case upon its merits, without passing upon that question.

Winslow, it will be remembered, became the purchaser of the certificate of purchase from Grow at the instance and request of Noble,—not for the purpose of speculating out of the land, but for the purpose of aiding Noble to save something out of the land, which had been sold, and the redemption was about to expire, and all would then be lost to him, as he then supposed. By inducing Winslow to purchase the certificate of purchase, and thus obtain the title to the land, Noble realized \$400 by the transaction. Now, after Noble

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has induced Winslow to make this purchase and pay all the land is worth, and has obtained from Winslow \$400 and put it in his own pocket, will equity allow him to repudiate what he has done, retain the money Winslow paid for the land, and recover, by a decree in chancery, almost one-half in value of the land which he induced Winslow to purchase? We do not believe any precedent can be found which would sanction such gross inequity and injustice.

It is an old and well established rule in equity, that he who seeks equity must do equity. Let us apply this rule to the present case, and see whether the decree can be sustained. Before Noble could call upon a court of equity for relief, justice and right would require him to refund Winslow the amount of money he had paid at the request of Noble, and surely equity would not allow Noble to retain the money Winslow had paid him, and at the same time give him the land. This would be no less than sanctioning a palpable fraud.

There is another well established rule in equity which ought not to be overlooked in a case of this character, which is, that a party must come into a court of equity with clean hands, otherwise his bill will be dismissed. (*Thorp v. McCullum*, 1 Gilm. 614.) Can it be said that Noble's hands are clean so long as he holds Winslow's money? We think not.

There is yet another feature in this case which precludes a decree in favor of the complainant in the bill. He not only induced Winslow to purchase the land, but as a part of the purchase contract he surrendered the possession of the property to him, and became a tenant of Winslow from July 8, 1879, to March 1, 1880, at a stipulated rent. Such is the effect of the contract which was executed by the parties. It reads as follows:

"BLOOMINGTON, ILL., July 8th, 1879.

"I have this day bought of T. J. Noble his farm, it being the land that Daniel Grow now holds a certificate of sale of,

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and occupied by said Noble, for which I agree to pay \$50 per acre, as follows, to settle with and pay Mr. Grow the money due him, and pay the balance to said Noble. I further agree to let said Noble hold possession of said farm until March 1st, 1880, for which he is to pay me, *as rent*, 8 per cent interest on purchase money, from time I pay the money until March 1st, 1880. I further agree to give said Noble the first refusal, to rent the said farm for one year or more, from March 1st, 1880, as may be agreed upon hereafter.

(Signed.)

N. N. WINSLOW,

T. J. NOBLE."

In *Brown v. Coon*, 36 Ill. 243, where the homestead had been sold by the owner thereof, by deed which did not release the homestead as required by statute, it was held, as possession was delivered under the deed, the title passed,—that the homestead right was lost by the abandonment of possession to plaintiff's grantee, as completely as if there had been a relinquishment in the form required by the statute. Here, Noble made no deed because a deed was not necessary, as the title had passed on the foreclosure sale. He did not move off the premises and surrender up actual possession to Winslow, but when he became Winslow's tenant under a written lease, the legal effect was the same as if he had moved off and Winslow had moved on the premises.

We are, therefore, of opinion that Noble abandoned his homestead rights. Indeed, under the language of sec. 4 of the Homestead act, Rev. Stat. 1874, p. 497, we do not see how Noble can claim homestead rights in the premises. It declares: "No release, waiver or conveyance of the estate so exempted shall be valid unless the same is in writing, subscribed by said householder, and his or her wife or husband, * * * and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned, or given pursuant to the conveyance." Here, when Noble leased the property and became the tenant

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of Winslow, possession, within the meaning of the statute, was given pursuant to the conveyance. *Eldridge v. Pierce*, 90 Ill. 474.

What was said in *Booker v. Anderson*, 35 Ill. 66, can have no bearing here, as the statute under which that decision was rendered did not contain the clause, "or possession is abandoned, or given pursuant to the conveyance," as the statute now does.

In any view we have been able to take of the case, we perceive no ground upon which the decree can be sustained.

The decree will be reversed, and the cause remanded, with directions to the circuit court to dismiss the bill.

Decree reversed.

Mr. Justice Scott dissenting.

101	260
130	115
101	300
185	26

THE PEOPLE *ex rel.* Francis P. Gleeson

v.

GEORGE A. MEECH.

Filed at Springfield Sept. 30, 1881—Rehearing denied January Term, 1882.

1. JUSTICES OF THE PEACE—*uniformity of jurisdiction embraces territorial jurisdiction.* The territory in which a justice of the peace may act, or send process for service, is essential, and constitutes jurisdiction, and is referred to and embraced in the constitutional provision requiring uniformity of jurisdiction, and the provision prohibiting the passage of local or special laws regulating the jurisdiction and duties of justices of the peace.

2. SAME—*what is uniformity in territorial jurisdiction.* The constitution does not require that the districts within the limits of which the jurisdiction of justices of the peace and police magistrates is restricted or confined shall be of uniform size, but that such districts shall be created by counties or townships, and not partly of both, so that their jurisdiction throughout the State shall be coëxtensive with the counties in which they are elected, or limited to townships, if townships are adopted as the basis for districting.

3. CONSTITUTIONAL LAW—*creation of districts for justices of the peace.* The act of 1881, to amend certain sections of the act relating to the election

Statement of the case. Opinion of the Court.

of justices of the peace, creating each county in the State, except Cook county, a district, and making two districts of Cook county, and limiting the jurisdiction of such officers within such districts, is in contravention of that part of the constitution which requires that the jurisdiction of justices of the peace shall be uniform, and also of that part which prohibits the passage of any local or special laws regulating the jurisdiction of justices of the peace, such amendment operating to change the preëxisting law on the subject only in Cook county.

This is a petition for a *mandamus*, filed in this court by Francis P. Gleeson, against George A. Meech.

The relator, a resident of the town of South Chicago, in Cook county, demanded of the respondent, a justice of the peace in the same town, that he issue a summons, directed to any constable of Cook county, pursuant to the act of 1872, and tendered respondent his legal fees for such act, in order that the relator might have the writ served in the town of Hyde Park, in Cook county. This the respondent refused to issue, and refused to issue any writ except to a constable of "Chicago District," pursuant to the amendatory act of 1881. Hyde Park is in that part of Cook county denominated "Cook District" by the amendatory act.

The respondent filed a demurrer to the petition, which this court in its judgment overruled.

Mr. C. STUART BEATTY, for the relator.

Messrs. LAWRENCE, CAMPBELL & LAWRENCE, for the respondent.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The petition in this case was filed to test the constitutionality of the first section of "An act to amend certain sections of an act to provide for the election and qualification of justices of the peace," etc. (Laws 1881, p. 103.) That section provides that each county in the State shall constitute a justice's district, except Cook county, which is divided into two,—the city of Chicago one, and the territory outside of the

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city and within the county, another,—and to the limits of such districts the jurisdiction of all justices of the peace is expressly limited. It is claimed that this provision of the act contravenes several provisions of the constitution.

Section 21 of article 6 provides, “that justices of the peace, police magistrates and constables shall be elected in and for such districts as are or may be provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform.” The 28th section of the same article, however, makes an exception as to the city of Chicago, and requires that justices of the peace for the city shall be appointed in the manner therein prescribed. The 22d section of article 4 provides, that the General Assembly shall not pass any local or special laws in reference to a large number of subjects, amongst which is this, “regulating the jurisdiction and duties of justices of the peace, police magistrates and constables.” Other provisions of the constitution are referred to, but we deem it unimportant in this case to refer to them.

Of what does the jurisdiction of justices of the peace and police magistrates consist? Manifestly of the persons of the parties litigant, of the subject or thing in dispute, and the territory into which the process of the officer may run and be enforced. We apprehend this is so elementary that it will not be questioned. The justice must have power or jurisdiction to send process into some territory, by the service of which process he may acquire jurisdiction of the defendant, or the other elements of his jurisdiction would be barren, unless the defendant should voluntarily submit to the jurisdiction for trial. And so of final process, which is absolutely necessary to execute the judgment. His territorial jurisdiction is as essential to the complete administration of justice as either of the others, and the General Assembly fully recognizes the power to send process into a district, and to have it enforced therein, as constituting jurisdiction. After pre-

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scribing the districts. the act provides, that "to the limits of which the jurisdiction of all justices of the peace is hereby limited." It, then, incontestably follows, that the territory in which a justice of the peace may act is essential, and constitutes jurisdiction, and is referred to and embraced in both provisions of the constitution cited above.

This, then, being the sense of these provisions, the territorial districts must be uniform. Then what constitutes uniformity, in the constitutional sense? Not literally of one and the same shape or size. That could not have been the purpose. And this is made manifest from the constitution itself. It refers to districts as then existing, or that might thereafter be provided by law. The districts then existing were not of the same form or size, and yet they were adopted by those who framed the constitution. We must, therefore, conclude that such was not the purpose, and for the further reason that if not impracticable, it would have served no useful purpose. Uniformity of territory, then, must refer to some other division of territory. At the time the constitution was adopted the territorial jurisdiction of justices of the peace was coëxtensive with their counties throughout the State, and has ever been since the organization of the government, and the constitution adopts that division until a change shall be made, which it authorizes, with the limitation that when made the jurisdictional districts shall be uniform. And to be uniform, what does that instrument require? Manifestly, when counties are adopted as a basis of districting, that no other political division but counties can be adopted in part; or, when townships are adopted as the basis, it must all be by townships, and no other political division can be in part adopted. And so, when any other political division is adopted, to be uniform it must all be of such divisions. This is, we think, the true interpretation of the clause requiring uniformity of jurisdiction, and it follows that the formation of Cook county into two

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districts, whilst every other county in the State constitutes but one district, is a violation of the constitutional requirement of uniformity.

Is this a local or special law, within the meaning of the 22d section of article 4 of the constitution? Had there been but one section in the act, and it had referred to no other than Cook county, and had divided it, as is done by this act, could any one have entertained a doubt that it was a local or special law? We apprehend not. Then, when it declares that all other counties shall severally constitute a district, which they then were, and then divides Cook county, upon what principle, or for what reason, can it be said that it is not a local or special law? We are wholly unable to perceive. We must look to the substance of the act, and not to its mere form. Upon what does this section operate? Unquestionably upon Cook county alone. Strike all else out than what relates to Cook county, and no change would be made as to the jurisdiction of justices of the peace outside of Cook county. They then had jurisdiction throughout their counties, and if all that is said in reference to them in this section were rejected, their jurisdiction would be precisely the same. This section neither limits nor confers power or jurisdiction on them. This section is therefore local or special to Cook county, and contravenes the 22d section of the legislative article of the constitution, and is therefore void.

It may be urged that this is a very strict construction of the fundamental law. There seems to be no doubt that those who gave us that instrument had in their minds, and fully appreciated, the great wrongs, oppression, and almost disastrous results of special legislation that had obtained under the constitution of 1848, and the fact that such legislation conferred special privileges and exemptions on the few to the injury of the many, which was totally opposed to the principles upon which our institutions are based. They determined to effectually cut off such pernicious legislation by this pro-

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vision. This law is desired in Cook county, because it confers privileges or exemptions to a part of its inhabitants that are not enjoyed in common by the people at large. The first section proposes to exempt debtors from being sued out of the district in which they may live, although both districts may be in the same county. If this provision should be upheld, then a person residing in the city could not be sued beyond its limits, nor could a person residing out of its limits be sued in the city, without reference to the convenience or residence of the witnesses. These privileges, or burthens, whichever they might prove to be, are local and special.

If this provision were sustained, it would open the way to every species of special legislation on the subject of territorial jurisdiction of justices of the peace. In a portion of the counties it would be coëxtensive with their boundaries; in others, it would be confined to the township in which the justice might reside; in others, justices in townships on county lines might send process into adjoining townships in other counties. In some the suits might be confined to the residence of the plaintiff, and others to the township of the debtor; and a large number of other special laws might be suggested. In some of the counties most of such special laws might be in force at the same time, thereby creating confusion, without any benefit to the public, and all apparently for the benefit or convenience of the debtor or wrongdoing class.

If this provision is constitutional, can any one imagine a local or special law on this subject that could be distinguished from it and held unconstitutional? The effects of this particular provision might not be serious, but others that would certainly follow might prove highly pernicious. If, by a strained or even a liberal construction, this provision might be sustained, still it would be against the intention of the framers of the constitution. This would be the opening through which all kinds of obnoxious legislation on this sub-

Syllabus.

ject would pass. This section was intended to restrict the power of the General Assembly from passing any local or special law on the subject of the jurisdiction of justices of the peace. This is a local and special law relating to their jurisdiction, and is clearly unconstitutional.

The demurrer to the petition must therefore be overruled, and a peremptory writ of *mandamus* is awarded.

Mandamus awarded.

JOHN S. STEVENS

v.

CYRUS N. PRATT *et al.*

Filed at Springfield Sept. 30, 1881—Rehearing denied January Term, 1882.

1. CORPORATION—*right to take real estate security for debts.* The latter part of sec. 26, of the general Incorporation law of 1872, was not designed to prevent corporations from taking mortgages on real estate as security for debts. It would seem that the right to take such security, by the policy of our law, may be regarded as an incident to the right to create a debt.

2. SAME—*former decision as to corporations for loaning money.* That part of the opinion of the court in *United States Mortgage Co. v. Gross*, 93 Ill. 483, holding that it was a part of the policy of the law of this State, as shown by sec. 1 of the general Incorporation act of 1872, that corporations should not be formed in the State for the business of loaning money, is overruled.

3. This court also erred in that case in holding that the first sentence of sec. 26 of the general Incorporation law of 1872, manifests a policy that foreign corporations were to have no right to loan money in this State.

4. The clause in the Incorporation law of 1872, that "corporations may be formed in the manner provided by" that act, "for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money," was not intended to, and does not by implication, prohibit the formation of corporations for the purposes so excepted, under other acts. It only prohibits their formation under that act, and therefore does not show that such corporations are prohibited by the policy of the law.

101	206
123	136
101	206
125	600
101	206
143	470
145	622
101	206
153	33
154	187
101	206
68a	154
101	206
166	130
68a	672
101	206
173	323
173	456
101	206
187	*137
101	206
e101a	*379
101	206
h113a	604
113a	607

Statement of the case.

5. *SAME—foreign corporations, powers, etc., no greater than those of domestic.* The general Incorporation law of 1872 neither grants nor prohibits the right of foreign corporations to do business in this State. It is simply a law imposing regulations and restrictions, and its meaning is, that where the general laws of this State provide for the organization of corporations, foreign ones of like character doing business in this State shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions and duties.

6. *SAME—foreign, when no provision is made for like domestic.* The failure to provide for the organization of other domestic corporations than those named in the general law on the subject, is not an exclusion of foreign corporations of like character. The excepted corporations, and foreign corporations of like character, are simply unaffected by the general law of 1872; and as the formation of such corporations in the State is not prohibited, there is no prohibition of foreign corporations of the same character from doing business in this State.

7. *SAME—policy of State—how made to appear.* The policy of a State not to permit the transaction of business in its limits by foreign corporations, or to allow such corporations to acquire and hold real estate, must be expressed in some affirmative way. It can not be affirmed from the fact that the legislature has made no provision for the formation of similar corporations.

8. *SAME—policy of State to give power to make loans, etc.* The policy of the legislature of this State for many years has been to invest corporations with the power to loan money, and take mortgage on real estate as security therefor.

9. A loan made by a foreign corporation, in 1873, to a citizen of this State, secured by a mortgage given at the time, is not void as being prohibited by any legislation of the State, or contrary to public policy, and such mortgage may be foreclosed, and pass the title to real estate.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of ejectment, by appellant against appellees, for certain real estate in the city of Chicago, tried in the Superior Court of Cook county. The plea was, not guilty.

Preliminary affidavit was filed showing that the parties claimed from a common source of title—one Richard B. Appleby. Appellees claimed under a mortgage executed by said Appleby to the United States Mortgage Company, to

Brief for the Appellant.

secure a note, for money loaned, of \$5000, on the 25th of April, 1873, and duly recorded in the proper office on the next day. Appellant claimed under a mortgage executed by said Appleby to Elizabeth D. Smith, on the 17th of September, 1873, and duly recorded in the proper office on the 23d of said month, to secure a loan of \$2000.

Appellant claimed that he was entitled to hold title entirely disregarding the mortgage to the United States Mortgage Company, on the ground that the note and mortgage to that company were absolutely void.

The court rendered judgment on the trial in favor of appellees, and the record comes here by appeal.

Mr. W. C. GOUDY, and Mr. JAMES E. MONROE, for the appellant:

1. The United States Mortgage Company, at the time it made the loan to and received the pretended mortgage from Appleby, was expressly prohibited by the statutes of Illinois from exercising its powers in this State. General Incorp. Law of 1872, secs. 1 and 20; *United States Mortgage Co. v. Gross*, 93 Ill. 492.

2. A contract prohibited by statute, or against the manifest policy of the law, is a nullity. *Cincinnati Ins. Co. v. Rosenthal*, 55 Ill. 91; *Carroll v. East St. Louis*, 67 id. 577; *Starkweather v. American Bible Society*, 72 id. 50; *United States Trust Co. v. Lee*, 72 id. 143.

3. A mortgage made to a National bank to secure a contemporaneous loan is void. It passes no title and creates no lien, because the bank has not the power to take the mortgage, and the taking of it is prohibited. *Fridley v. Bowen*, 87 Ill. 155; *Fowler v. Scully*, 72 Pa. St. 456; *Crocker v. Whitney*, 71 N. Y. 161; *National Bank v. Powell*, 2 Dillon, 371; *Ripley v. Harris*, 3 Biss. 199.

4. All conveyances and contracts made in violation of law are void. Such conveyances pass no title. No one can

Brief for the Appellant.

pass a title or right on the violation of law. *Mitchell v. Smith*, 1 Binn. 110; *New York Ins. Co. v. Ely*, 2 Cow. 678; *Fowler v. Scully*, 72 Pa. St. 468.

5. When there is no right to acquire a title as mortgagee, the mortgage is a nullity. *Fowler v. Scully*, 72 Pa. St. 468; *Metropolitan Bank v. Godfrey*, 23 Ill. 610.

6. A deed which is insufficient to pass the title can not be made valid by subsequent legislation. *Lane v. Soulard*, 15 Ill. 125; *Illinois R. R. Co. v. Cook*, 29 id. 241; *Rogers v. Higgins*, 48 id. 211; Same case, 57 id. 244; *Russell v. Ramsay*, 35 id. 262, 374; *Deininger v. McConnel*, 41 id. 227; *Conway v. Cable*, 37 id. 82; *Gebhart v. Reeves*, 75 id. 301; *Helm v. Webster*, 85 id. 116; *McDaniel v. Correll*, 19 id. 226.

7. Courts will not so construe general words in a statute as to give them a retrospective operation to take away rights of property previously vested, unless the intent is very clear. *Gillmore v. Shuter*, 2 Md. 310; *Couch v. Jeffries*, 4 Burr. 2461; *Dash v. Van Kleeck*, 7 Johns. 477; *Wood v. Oakley*, 11 Paige, 403; *Matter of Protestant Episcopal School*, 58 Barb. 161; *Williams v. Johnson*, 30 Md. 500; *Hooker v. Hooker*, 10 S. & M. 599.

8. The following cases are believed to be in point on the exact question raised in this case,—that is, the question of the power of the legislature to validate the mortgage of the mortgage company, to the prejudice of Smith's mortgage interest. *Meighen v. Strong*, 6 Minn. 177; *Thompson v. Morgan*, id. 292; *Wright v. Hawkins*, 28 Texas, 452; *Sherwood v. Fleming*, 25 id. (Supp.) 408; *Williamson v. New Jersey R. R. Co.* 29 N. J. Eq. 311; *Smith v. Morse*, 2 Cal. 524; *Garnett v. Stockton*, 7 Humph. 84; *Bolton v. Johns*, 8 Barr, 145; *Ballard v. Ward*, 89 Pa. St. 358.

9. The following cases are on the point that the law of the State, in force when the contract is made, is a part of the contract, and a statute changing the law to the prejudice of either party to the contract is violative of the obligation

Brief for the Appellees.

of the contract, and void: *Bronson v. Kinzie*, 1 How. 311; *Brine v. Insurance Co.* 96 U. S. 627; *Edwards v. Kearzey*, 96 id. 601; *Van Hoffman v. Quincy*, 4 Wall. 535; *McCracken v. Hayward*, 2 How. 508; *Smoot v. Lafferty*, 2 Gilm. 383.

MESSRS. DEXTER, HERRICK & ALLEN, Mr. M. W. FULLER, and Mr. FRANK J. CRAWFORD, for the appellees :

The loaning of money by corporations created for that business was not, at the time of this transaction, prohibited by any statute of the State of Illinois, expressly, or by just implication, and was not opposed to any general policy indicated in any particular statute of the State.

The policy of a State not to allow foreign corporations to transact business within its limits, or acquire and hold real estate, must be expressed in some affirmative way. *Cowell v. Springs Co.* 10 Otto, 59; *Christian Union v. Yount*, 11 id. 352.

A party having the benefit of the contract, it having been fully performed by the corporation, will be estopped from setting up a want of power in the corporation to make and perform the contract. *Whitney Arms Co. v. Barlow*, 63 N. Y. 63; *Darst v. Gale*, 83 Ill. 140; *Ward v. Johnson*, 95 id. 215; *Railway Co. v. McCarthy*, 96 U. S. 267; *Daniels v. Tearney*, 12 Otto, 421; *Ferguson v. Landrom*, 5 Bush, 230; *United States v. Hodsen*, 10 Wall. 395; *Mott v. United States Trust Co.* 19 Barb. 569; *Steam Navigation Co. v. Weed*, 17 id. 378; *Chester Glass Co. v. Dewey*, 16 Mass. 102.

An estoppel *in pais* may be shown as a defence in an action of ejectment. *Dickerson v. Colgrove*, 10 Otto, 579; *Kirk v. Hamilton*, 12 id. 68; *Lee v. Getty*, 26 Ill. 76; *Noble v. Chrisman*, 88 id. 187; *Fisher v. Milmine*, 94 id. 328; *Brown v. Wheeler*, 17 Conn. 352; *Shaw v. Bebee*, 35 Vt. 209; *Rangley v. Spring*, 28 Me. 127; *Burkholter v. Edwards*, 16 Ga. 597.

The legality of the corporation in making the loan can not be drawn in question in this suit. If a corporation can take land for some purposes, the question whether the particular

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title was taken for an unauthorized purpose can not be tried collaterally. *Hough v. Cook County Land Co.* 73 Ill. 23; *National Bank v. Matthews*, 98 U. S. 628; *Union Water Co. v. Murphy's Flat Fluming Co.* 22 Cal. 621; *Grant v. Henry Clay Coal Co.* 80 Pa. St. 218.

When a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. *National Bank v. Matthews*, 98 U. S. 628.

The legislature may, when it interferes with no vested rights, enact retrospective statutes to validate invalid contracts, or to ratify and confirm any act it might lawfully have authorized in the first instance. *United States Mortgage Co. v. Gross*, 95 Ill. 494; *Goshen v. Stonington*, 4 Conn. 210; *Beach v. Walker*, 6 id. 197; *State v. Newark*, 7 N. J. L. 197; *Foster v. Essex Bank*, 16 Mass. 245; *Cowan v. Mutual Benefit Life Ins. Co.* 52 Pa. St. 287; *Lane v. Nelson*, 79 id. 407; *Butler v. Toledo*, 5 Ohio St. 225; *Cooley on Const. Lim.* 374.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

In the view we take of the questions presented by this record, it will be sufficient to inquire whether the United States Mortgage Company's acts, in loaning its money to Appleby, and taking from him his note and mortgage therefor, were void. The contention of the counsel for appellant is, they were void, and therefore incapable of imparting rights to anybody, and if this be not correct, the judgment below must be affirmed, without regard to the merits of the other questions discussed. These acts involve no moral turpitude, and they are, in no sensible degree, detrimental to the public welfare, and the only ground upon which their invalidity is claimed is, that company, as a foreign corporation, created solely for the business of loaning money, can have no legal existence, and hence do no act forming the basis of a legal right, within this State.

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In *United States Mortgage Co. v. Gross*, 93 Ill. 483, it was assumed, from the name of this corporation, the character of its transactions there involved, and the facts appearing in the case, that its principal or sole business was to loan money, taking to itself mortgages on real estate to secure the same, and it was thereupon there said: "The general Incorporation law of 1872, which was in force when the mortgage was executed, provided for the formation in the State of companies for any lawful purpose, expressly excepting, however, corporations for banking, insurance, real estate brokerage, operation of railroads, and the business of loaning money." Section 26 of the act provided that "foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions and duties that are, or may be, imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for the pecuniary profits of its stockholders or members, shall purchase or hold real estate in this State, except as provided for in this act.

"From these statutory enactments we deduce these conclusions: the latter sentence of section 26 was aimed at the purchasing and holding of real estate by corporations, for the reason such acts would tend to create perpetuities, and by this and other provisions of the same act the evil feared was effectually guarded against. We think, however, it was not designed thereby to prevent corporations from taking mortgages on real estate as security for debts. In fact, the act contemplates corporations will acquire real estate in satisfaction of indebtedness due them, and makes such provision in the fifth section for the sale of real estate so taken, as secures the State against the evil had in legislative view, and which had been discussed by this court in *Carroll v. City of East St. Louis*, 67 Ill. 568. Indeed, it is difficult to see how mort-

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gages, which are conveyances subject to conditions of defeasance, can be considered as tending to create perpetuities. Payments made of the debts thus secured defeat the titles of the mortgagees, and even if they take possession, the incomes gradually undermine and destroy their titles. If the premises are sold under powers, the mortgagees can not, themselves, become purchasers, and if the mortgages are foreclosed by suit, the decrees of the court thereafter become the bases of title.

"But we see, from the first sentence of this section 26, it was the policy of the State that foreign corporations should have no other or greater powers in the State than corporations of like character organized under the general laws of the State; and further see, from the first section of the act, it was a part of that same policy that corporations should not be formed in the State for the business of loaning money. It follows, that corporations organized in a foreign State for such business of loaning money, could not claim to pursue such business in this State. The comity between the States does not demand we should hold this mortgage company, incorporated under an act of the State of New York, could lawfully, within this State, exercise powers denied to corporations formed within our own borders. All the acts of this company here done in furtherance of such business of loaning money, were invalid, as being obnoxious to our policy and institutions." But it was also held that the act of April 9, 1875, validated contracts of loans previously made by the company, and made them enforceable the same as if they had not been prohibited when made.

Counsel for appellant assail the latter, and counsel for appellees the former, position, as being unsound in law, and wholly incapable of being sustained upon any correct legal principles.

The question of the validity of such contracts may be far-reaching in its consequences, and affect large property rights.

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If they are valid upon any ground, the decision should be placed on that ground, while if they are invalid they should be so declared, and the question put at rest, so that in the future they may be avoided. In *Bowers v. Green*, 1 Scam. 42, it was said by this court: "The maxim *stare decisis* is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude courts from investigating former decisions, when the question has not undergone repeated examination, and become well settled." To the same effect is *Mallett v. Butcher*, 41 Ill. 383; *Leavitt v. Blatchford*, 17 N. Y. 533; *Pratt v. Brown*, 3 Wis. 609.

No reason exists, therefore, which should preclude our reëxamining the grounds of our decision in *United States Mortgage Co. v. Gross*, *supra*, so far, at least, as may be necessary to what we shall deem a correct decision in the present case; but, on the contrary, in view of the importance of the questions involved, it is a duty we owe to the court and to the public to do so, with such care as we can exercise. We still think, as there said, it was not designed by section 26 of the Incorporation law of 1872, to prevent corporations from taking mortgages on real estate as security for debts. Indeed, sections 5 and 17, in express language, contemplate that this shall be done, and provide regulations whereby, when title shall be acquired to real estate, the corporation shall be compelled to sell it, and thereby avoid the evils anticipated from the accumulation of titles to real estate in the hands of corporations, in *Carroll v. East St. Louis*, 67 Ill. 568. Moreover, the policy of taking mortgages upon real estate to secure the payment of debts, by corporations as well as by individuals, in almost innumerable instances, has been recognized by legislation in this State; and we are unable to recall an instance where a corporation has been allowed to create a debt, and has been, at the same time, denied the right to take mortgage on real estate to secure it. It would seem, the

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right to take such security, by the policy of our law, might be regarded as an incident to the right to create a debt. Under restrictions and regulations of like character with those of the general law, no injurious consequences can possibly result to the public from so holding.

Subsequent examination and reflection, however, have convinced us that we were clearly in error in holding that it is shown by the first section of this law that it was a part of the policy of the State that corporations should not be formed in the State for the business of loaning money. That section simply defines the classes or kinds of corporations for the organization of which the act is intended to provide. It says: "Corporations may be formed, *in the manner provided by this act*, for ~~any~~ lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money." It is not said, nor is it the reasonable implication, that the corporations excepted may not be formed *under other acts*. Indeed, the implication is directly the reverse, for the business of the excepted corporations, by the proper construction of the language employed, is called "lawful," and there can, in the absence of unmistakable language, be no presumption of exclusion of that which is "lawful,"—that is to say, which has the sanction or permission, and is consequently entitled to the protection, of the law. It is well answered by counsel for appellees: "If this reasoning is correct, it would follow that the first section was also a declaration of the policy of the State that corporations should not be formed for any of the other excepted purposes, including insurance and the operation of railroads." Yet there was, at that time, in force, and unaffected by that statute, a general law providing for the formation of insurance companies, and at the same session of the legislature at which that law was enacted, another law was also enacted for the formation of corporations for the operation of railroads. It is true *that act* provides for only certain corporations, and

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gives no right to incorporate for other purposes, and from this there may be an implication that the legislature would not grant the right to be incorporated for the excepted purposes, *in the same manner*, and subject to the *same regulations and restrictions*, but it is not therefore to be assumed that the legislature was unwilling to grant the right to be incorporated for the excepted purposes in *another manner*, and subject to *other regulations and restrictions*. From the different natures and purposes of the excepted corporations, reason exists why different and more stringent restrictions should be thrown around them; but in such a country as ours, the public welfare demands that they be allowed to be created, under proper and wise safeguards for the protection of the public, and not that they be absolutely prohibited.

On further consideration and reflection, we are convinced we also erred in holding that the first sentence of section 26 of that law manifests a policy that foreign corporations were to have no right to loan money in this State. That sentence does not say that no foreign corporation except those of like character as are provided to be formed under that act, shall be allowed to do business in this State. It does not assume to define what foreign corporations shall be allowed to do business in this State, but simply to impose regulations and restrictions upon certain named classes or kinds of foreign corporations doing business in this State,—that is, those of like character as it is provided may be formed under that general law. Its exact words are, “foreign corporations, and the officers and agents thereof, doing business in this State,” (that is, that *are doing* business, not that shall hereafter *be allowed* to do business in this State,) “shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and have no other or greater powers.” The language is entirely that of regulation and restriction, and not that of grant or prohibition. No corpora-

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tion is granted the right to do business in the State. No corporation is excluded from doing business in this State. Simply "foreign corporations, and the officers and agents thereof, doing business in this State," are placed on an equality, to the extent that they shall exercise no greater or different powers, and shall be subject to the same regulations and restrictions, and governed by the same rules of law in these respects, with corporations of like character organized or to be organized under the general laws of this State. The meaning will, obviously, not be changed, but may be placed in a stronger light, by a little transposition of language, thus: "Where the general laws of this State provide for the organization of corporations, foreign corporations of like character doing business in this State shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions and duties." The manifest and only purpose was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law. It can not be said that the failure to provide for the organization of other corporations, by general laws, is an exclusion of foreign corporations of like character, unless it shall be held that the failure to enact such general laws is an evidence that they are opposed to our policy.

But we have already said that from this failure there may be an implication that the legislature would not grant the right to be incorporated for the excepted purposes, *in the same manner and subject to the same restrictions*; but it is not therefore to be assumed that the legislature was unwilling to grant the right to be incorporated for the excepted purposes in *another manner, and subject to other regulations and restrictions*. The excepted purposes, banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money, we have also heretofore said are recognized by the general law as being "lawful." We know, from their char-

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acter, they are not *malum in se*, and we know they have never become *malum prohibitum*, unqualifiedly, by any constitution or statute of this State, and our observation and experience teach us that under wise and wholesome restrictions and regulations they are important and beneficial, if not indispensable, factors in the general business welfare of the State. Whether they shall be allowed to be carried on by one individual or by many, by partnerships or corporations, is evidently purely a question of policy, and not a question of power or right in the government; and it may be asserted, without the fear of contradiction, that the policy of the State has been to allow banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money, either independently or in connection with or as incidental to other branches of business, by corporations—and this will hereafter be fully shown by reference to specific acts of the legislature. But corporations for these purposes, under our constitution, are private: The public does not become a stockholder in or owner of them, and so it is not the business of the legislature, of its own volition and unsolicited, in order to indicate its policy, merely, to incorporate or provide for the incorporation of such companies. The power to provide for the corporation exists, but it is useless to exercise it unless there is a demand for it,—in other words, if no persons desire to become incorporated for these purposes, no unfavorable inference can be drawn from the failure of the legislature to enact laws upon the subject. It is true, the reason a legislature fails to enact a general law providing for a particular class of incorporations *may be* because to do so would be opposed to its policy; but it may also fail to do so because there is no demand for such a law—either because the demand has heretofore been answered by special acts of incorporation, adopted prior to but continued in force by the present constitution, or because money in the State is scarce, and can be borrowed abroad, as is often the case, much cheaper than

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at home, or from both causes. It can hardly admit of debate, that, ordinarily, a demand for private charters, either through general or local and special laws, will not exist unless it is understood profitable returns can be made on money invested in business thereunder; and whether such returns can be made, will, usually, depend on questions entirely disconnected from the disposition of the legislature to grant or withhold legislation for such charters. And so, it follows, mere absence of legislation authorizing the formation, in the future, of a particular class or kind of corporations, can not be accepted as conclusive evidence that it is against public policy to create such corporations.

But again, what was in the legislative mind when this general law was enacted? Manifestly, only the classes of corporations anticipated to be created under its provisions, as defined in section 1. The necessity for, and the powers, limitations and restrictions proper to other corporations (those excepted), can, under no rational rule of construction, be presumed to have been in mind. Stated differently, the legislators' minds are presumed to have been directed to what they were doing, and not to what they were not doing. They were providing for certain corporations, leaving others unprovided for, and so what they did not provide for is not affected by the legislation they enacted, whether we regard domestic or foreign corporations. The excepted corporations, and foreign corporations of like character, are simply unaffected by this law. And this was the purport of our ruling in *Wincock et al. v. Turpin*, 96 Ill. 135, where we held that the remedies provided for creditors against stockholders, although in broad and comprehensive language, applied only to the corporations organized under this act.

We concede all foreign corporations might have been prohibited from doing business in this State except those of like character as contemplated to be organized under the provisions of this act; but then it would have been very easy to

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have said so in unmistakable terms, and we do not feel warranted in assuming, from the absence of language, or from, even (if it were to be found) ambiguous language, that a policy has been adopted so repugnant to the business welfare of our citizens, and so wanting in that spirit of comity which should characterize the conduct of the sister States towards each other.

Counsel say, "the prohibition is not against doing business in this State, but it is against having any other or greater powers, and as a domestic corporation could not have any, so the foreign could have none whatever." This would be true if the statute prohibited other corporations than such as are of like character with those contemplated to be incorporated under its provisions, from doing business in the State. But we have seen that this is not its language, nor, in our opinion, its meaning. It does not apply, either in terms or by implication, to other foreign corporations than such as are of like character with those contemplated to be organized under its provisions. What powers they may exercise, and what regulations or restrictions they shall be subject to, is defined. What powers other foreign corporations may exercise, and under what regulations and restrictions they shall be allowed to act, is not defined.

Counsel ask the question, "Can it be seriously pretended that a foreign corporation excluded from the State can make a contract in this State without authority, and enforce it in the courts of this State?" We answer, certainly not. But this assumes this corporation has been excluded from this State. How has it been excluded? We have shown it is not excluded by the positive *letter* of the law, and we think we have furnished satisfactory reasons why it can not be held to have been excluded by a fair construction of the *meaning* of the law. It remains only, then, to inquire whether, aside from the general law, it is contrary to public policy, or injurious to our welfare, to tolerate this corporation, and enforce its con-

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tracts in this State. The only cases referred to by counsel, on this question, are *United States Trust Co. v. Lee*, 73 Ill. 142; *Cin. M. H. A. Co. v. Rosenthal*, 55 id. 85; *Starkweather v. American Bible Society*, 72 id. 50; *Carroll v. City of East St. Louis*, 67 id. 570.

In *Cin. M. H. A. Co. v. Rosenthal*, assumpsit was brought on a promissory note given for stock in an insurance company, and for premium on a policy issued by such company, payable upon the call of the directors. The defence interposed was, the insurance company was a foreign corporation, and it had not at any time, previous to the making of the note, furnished the Auditor of this State with a statement of the condition and affairs of the company, as required by the law then in force, and the Auditor had not issued to the company, or any agent, any authority to transact business in this State, which, it was averred, rendered the note void, and of no binding effect. The defence was sustained, and the note held void, upon the ground that the transaction was expressly prohibited by law. Among other things, the court there said: "The note was made and delivered, and the policy given, and the contract consummated, in this State, in defiance of a law which is so plain in its terms that it can bear no construction, and which no one can misunderstand, declaring all such contracts unlawful. It says, it shall not be lawful for any such agent, directly or indirectly, to take risks, or transact any business of insurance in this State, until they comply with the terms prescribed in the act. To permit the company, when they admit they have disregarded all these requirements, to recover, would be for the courts to disregard the clearly expressed will of the General Assembly, and to say what it has said shall be unlawful, is and shall be lawful and binding."

In *Carroll v. The City of East St. Louis*, the action was ejectment, and the question was, whether the Connecticut Land Company could, in this State, take, hold and convey

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titles to real estate. It was held that it could not, because to allow it to do so would tend to create perpetuities, and it was contrary to the general public policy of this State to allow corporations to be created for the sole purpose of buying, holding and selling, or conveying real estate, and this was shown by reference to the practice of the State in refusing to grant charters, etc., for this purpose, and in the general legislation on kindred questions.

So far as *Starkweather v. American Bible Society* has any bearing upon this question, it rests upon the same principle as *Carroll v. City of East St. Louis*.

In *United States Trust Co. v. Lee*, it was held, upon the principle of *Carroll v. East St. Louis*, a foreign corporation can not be a trustee of real estate.

In neither of these cases was the mere absence of legislation creating or authorizing the creation of a corporation for a particular purpose, held to be sufficient evidence showing that it was against public policy to allow foreign corporations of like character to transact business in this State; but, upon the contrary, the decisions are expressly predicated upon the direct affirmative acts of the State in refusing to create such corporations, or in denying their power to transact business in the State.

In *Bank of Augusta v. Earle*, 13 Pet. 277, in answer to the position of counsel that the rules of comity between foreign nations do not apply to the States of this Union, that they extend to one another no other rights than those which are given by the constitution of the United States, and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States as a part of its jurisprudence, or that it acknowledges any rights but those which are secured by the constitution of the United States, the court, per TANEY, Ch. J. said: "The court think otherwise. The intimate union of these States

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as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between the States? They are sovereign States, and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently loaned in one State by a corporation created in another. The numerous banks established by different States are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and so generally acquiesced in by the States, that the court can not overlook them when a question like the one before us is under consideration. The silence of the State authorities while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another State." And again, he says: "So far as any of them (the States) have acted on this subject, it is evident that they have regarded the comity of contracts, as well as the comity of suit, to be a part of the law of the State, unless restricted by statute."

The doctrine of this case is approved, and its ruling followed, in *Bank of Washtenaw v. Montgomery*, 2 Scam. 422.

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The court there, among other things, said: "It can not well be imagined that the courts of any State would refuse to execute a contract by which a corporation had borrowed money in another State than that by which it was created. * * * Unless there should be a prohibition by statute, we can see no possible ground on which to rest the objection to the right of a foreign corporation to maintain an action in our courts."

In *Farmers' Loan and Trust Co. of N. Y. v. McKinney*, 6 McLean, 7, the court said: "In Michigan, no law or policy of the State is shown which prohibits corporations from purchasing lands in the State, and it is presumed that no such law as in the State of Pennsylvania exists in Michigan. It would seem, therefore, that the corporation of another State, as the Farmers' Loan and Trust Company, which is authorized by its charter to loan money on mortgages, may take a mortgage on lands in Michigan, there being no prohibitory law or policy of that State on the subject." Again it is said: "And that such a legal organization, having the right to loan money on mortgages without restriction of territory, should have a right to take mortgages wherever its loans are made, would seem to be a matter of course. And this may be safely assumed, where there is no prohibition."

In *Cowell v. Springs Co.* 100 U. S. (10 Otto,) 55, the National Land Improvement Company, of El Paso county, Colorado, was a corporation created under the laws of Pennsylvania, with power to "receive, hold, and grant real and personal property, explore, locate and improve lands, etc., * * provided such lands be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi." By the law of Congress of March 2, 1867, then in force, the legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits. The defendant contended

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that this corporation had no capacity to act in the Territory of Colorado, and to hold and convey real property there,—that Congress intended to prevent the creation of corporations like this, and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not, for like reasons, be permitted to exercise them in the Territory. But the court said: "The answer to this position is found in the general comity, which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way,—it can not be affirmed from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their legislatures had created or authorized the creation of similar corporations, and numerous corporations existing by special charter in one State, are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden." The same doctrine was subsequently repeated by the same court in *Christian Union v. Yount*, 101 U. S. (11 Otto,) 356.

No one pretends that the business of loaning money, or taking mortgage security therefor, was ever prohibited by law in this State, and we shall show the policy of this State has been to invest corporations with these powers.

On the 19th of February, 1857, an act was passed by the General Assembly, and approved by the Governor, incorporating the Farmers' Savings, Loan and Trust Company, and

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it was authorized to "have, enjoy and exercise all the powers necessary to carry out and execute the purposes and intent of a savings, loan and trust company," and it was specially empowered to "take and hold any real estate, in trust or otherwise, as security for, or in payment of, loans and debts due or to become due, to purchase real estate at any sale made in virtue of any loan, debt or mortgage made to or held by the said company." (Private Laws of 1857, p. 1386.) The Chicago Loan and Trust Company was incorporated under an act of the legislature approved February 19, 1859, and it was empowered to borrow money, and receive money on deposit, and pay interest thereon, and to loan the said money," etc., and also to "take and hold any real estate, in trust or otherwise, as security for, or in payment of, loans and debts due and to become due to said company, to purchase real estate at any sale made in virtue or on account of any loan, debt, or mortgage, or trust, made to or held by the said company," etc. (Private Laws of 1859, p. 401, secs. 3, 4.) The Central City Trust Company was incorporated under an act of the legislature February 21, 1861. (Private Laws of 1861, p. 453.) The Princeton Loan and Trust Company was incorporated under an act approved February 16, 1865. (Private Laws of 1865, vol. 1, p. 24.) The Marion County Trust and Loan Company was incorporated under an act approved March 8, 1867. (Private Laws of 1867, vol. 2, p. 277.) The Avon Exchange and Loan Company was incorporated under an act approved March 31, 1869. (Private Laws of 1869, vol. 2, p. 700.) And the Montgomery County Loan and Trust Company was incorporated under an act also approved March 31, 1869. (Laws of 1869, vol. 2, p. 714.) And all of these last named corporations were vested with substantially the same powers, in respect to loaning money and taking mortgage therefor, as was the Chicago Loan and Trust Company, *supra*. In 1867, the General Assembly also incorporated the "International Mutual Trust Company," and

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invested it with power to hold and loan money, and to take and hold real estate in trust, as security for the payment of loans and debts due the corporation. (Private Laws of 1867, vol. 1, p. 95.) And it was shown, upon the trial of *The People ex rel. v. Læwenthal*, 93 Ill. 191, which was a proceeding by *quo warranto* to test the validity of that charter, that about 175 charters or statutes had been passed since the adoption of the constitution of 1848, establishing corporations with like powers as those conferred upon the International Mutual Trust Company. Many of these corporations, thus created by special charter before the adoption of the present constitution, are still doing business in the State, and have been ever since they were created, that instrument only providing for the formation of private corporations, under general laws, in the future, but leaving those organized and doing business before its adoption in full force, and unaffected by its requirements.

Since the adoption of the present constitution, and on the 4th of April, 1872, a general law was enacted to enable associations to become incorporated to raise funds to be loaned only among their members, and power was given to loan their capital, under certain restrictions, to their own members, and to take mortgage on real estate as security therefor, (2 Gross' Stat. p. 67,) and on the 9th of April, 1875, an act was approved "to enable corporations in other States and countries to loan money in Illinois, to enforce their securities, and acquire title to real estate as security." (Pub. Laws of 1875, p. 65.)

We doubt if a more uniform and consistent policy can be shown to have been pursued by the State upon any other subject, for the last twenty years, than is thus shown to have been pursued with regard to investing corporations with power to loan money and take mortgage upon real estate as security therefor.

But it seems to be thought that the corporations referred to materially differ from the corporation here, in that

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they all had power to borrow money and receive money on deposit, etc., as well as to loan money, while here, the power is simply to loan money. If it be conceded that difference exists, can it affect materially the question under consideration? If a corporation be empowered to loan money and take mortgage therefor, is not this sufficient? In these special charters the power to loan is a separate and distinct power, and not incidental, merely. It is not compulsory on the corporations that they shall exercise all their granted powers, and inasmuch as the exercise of one power is not dependent upon the others, it is, it would seem, totally unimportant, on principle, whether one corporation be created with power to loan its capital, and another corporation be created with power to discount bills or notes, or one corporation be authorized to do all. If all are legal, when vested in one, what makes them illegal when vested in two? Can it possibly make any difference to the sovereign State of Illinois, or to any of its citizens, whether a foreign corporation, which comes here to loan its money, has power by its charter to effect insurance, as well as to loan money, or whether it has power merely to loan money? Is there anything in the exercise of this power by a corporation which is affected by the additional powers possessed by the corporation, or by the fact whether or not it has additional powers? Until it can be demonstrated that the possession of the additional powers can, in some substantial way, affect the loan, we must hold that it can make no difference whether the corporation be authorized to bank, or effect insurance, or build railroads, as well as to loan money, or whether it is authorized to effect loans, solely. We think it is only material to know, for the present purpose, that loaning money and taking mortgage on real estate as security are recognized, under our law, as a lawful business, and that it is a business which it has been the policy of our State to vest in corporations, and this, too, usually, without regard to whether other independent powers

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in regard to business have also been vested in the corporations.

But this corporation, in addition to the power to loan money, is expressly invested with power, by its charter, to issue bonds of the company, and sell and dispose of them, (which is, in effect, power to borrow money,) to receive moneys on deposit, and to purchase, hold and convey such real estate, etc., as the company may acquire in the collection or settlement of its demands, etc., thus making it, substantially, a corporation of the same character as those incorporated under the special charters to which we have referred.

In the first section of the act of April 9, 1875, *supra*, it is enacted that any foreign corporation that may have invested or lent money in this State, "may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State," etc. Waiving all question of the competency and effect of this as a validating statute, we think, in connection with the practice of the State, as evinced in the enactment of the laws before referred to, that it should be regarded as conclusive on the question of the general public policy of the State. It emanates from the legislature,—the tribunal in which is lodged the power to determine the question of public policy,—and is an assertion, in effect, that the transactions of such corporations have not been contrary to the general public policy of the State.

In *Railway Investments and Securities*, 2 Redfield's Am. Ry. Cases, 226, in speaking of an analogous statute, Judge CURTIS, of the Supreme Court of the United States, then presiding at circuit, said: "After the legislature had thus granted to the corporation new powers, to enable it the better to accomplish its duties to the public by paying off this mortgage, and had interposed to facilitate the exercise of the powers of the trustees under the mortgage by regulating and

Additional opinion of the Court.

restricting the personal liabilities to be incurred by them in the exercise of these powers, it seems to be impossible to maintain that the mortgage itself is void because contrary to the public policy of the State. The will of the legislature, while acting within the powers conferred by the people of the State, constitutes the public policy of the State, and so far from manifesting its will to have this mortgage void and inoperative, it has interfered to help out its operation, and make it more easily available as a security. I do not think a court of justice can undertake to declare that mortgage was contrary to the public policy of the State, after the legislature has directly interposed to aid the mortgagees to act under it."

For the reasons expressed, we are of opinion the note and mortgage were not void when given, but were valid and binding, and being so, the junior mortgage by Appleby to Smith is not entitled to priority.

The decree of the Superior Court is affirmed.

Decree affirmed.

MR. JUSTICE WALKER: I am unable to concur in the conclusion reached.

Subsequently, on an application for a rehearing, the following additional opinion was filed:

PER CURIAM: A rehearing is prayed for in this case, mainly on the ground that the appellant and his grantor purchased and paid for the land in controversy after the decision in *United States Mortgage Co. v. Gross*, 93 Ill. 483, and upon the faith of that decision. Counsel say: "After the last opinion in the *Gross* case had been filed, and after the decision therein had become, so far as this court could make it, the established law of this State, the appellant and his grantor (Corbine) purchased and paid for the land in controversy here, relying upon that decision, and believing, as they had a right to be-

Additional opinion of the Court.

lieve, that the law was as this court had therein deliberately declared it to be." But the decision in *United States Mortgage Co. v. Gross* was precisely as is the decision here, namely, that the mortgage to the United States Mortgage Company was valid, and hence entitled to priority over subsequent claims to the same property. In that case the court, in assigning reasons for the decision made, expressed the opinion that the mortgage, when first executed, was void, because contrary to public policy, but that it had been validated, and made binding and obligatory, by the act of April 9, 1875. This, however, was mere argument to justify the decision. The decision was, simply, as before said, that the mortgage was valid, and hence entitled to priority over subsequent claims to the same property.

On the theory of reasoning adopted by the counsel for appellant, when the appellant and his grantor bought, they bought with the knowledge and on the faith that this court held the mortgage by Appleby to the United States Mortgage Company valid and binding, and entitled to priority over the claim they were then purchasing. They have not been disappointed, therefore, by the present decision, and cut out of any right which, by *United States Mortgage Co. v. Gross*, we held they might acquire. The title or claim we held good in *United States Mortgage Co. v. Gross*, we still hold good, though for a different, and, we think, more satisfactory reason. Indeed, we have not here ruled that it is impossible to sustain the claim of the Mortgage Company on the ground assigned in the *Gross* case. We have simply placed our ruling on different, and, as we think, stronger ground. Had we, in all respects, not only ruled, but also reasoned, as in the *Gross* case, appellant's position would not have been, in the slightest, different from that which is now assigned to him.

It is nowhere decided that parties have vested rights in the reasons assigned for decisions. Where was it ever held

Additional opinion of the Court.

that a line of decisions was to be set aside, and the judgments opened up, merely because it was subsequently discovered stronger and more satisfactory reasons existed for the ruling than those expressed when the decisions were made? Had the decision here been different from what it was in the *Gross case*, the authorities cited by counsel would be applicable; but since the decision here is the same, and the reasoning in support of the decision only is different, they have no application.

It is also said by counsel, "instances mentioned of domestic corporations having power to loan money, are not applicable. All such corporations were banks." In this view, also, counsel are in error. We have expressly decided, in *People ex rel. v. Lowenthal et al. supra*, such corporations are not banks.

In connection with this petition we have also carefully considered the petition for rehearing in *Commercial Union Assurance Co. v. Scammon*, 102 Ill. 46. The most forcible argument there, as we think, against our position as expressed in the opinion here, is thus stated: "When the State, by a constitutional requirement, prohibited its own citizens from acquiring any more special privileges of any kind, and passed laws for the formation of corporations for the transaction of almost every other kind of business but that of loaning money, it thereby declared that it would not, until it saw fit, permit the transaction of that kind of business through the instrumentality of any new corporation." This, as we conceive, is sufficiently answered in the opinion by the quotation there given from the opinion of Mr. Justice FIELD, in *Cowell v. Springs Co.* 100 U. S. (10 Otto,) 55. The act of Congress there imposed the same restriction upon the territorial legislature that our constitution imposes upon our legislature, and as has been seen, it was there held, and the court in express terms declared, "it can not be affirmed, from the fact that its legislature has made no provision for the formation of similar

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corporations, or allows corporations only to be formed by general law," that the policy of the territory was against the formation of such corporations, but that such policy must be expressed in some affirmative way.

We have patiently, and with such care as we can bestow consistently with other duties, gone over and reconsidered every portion of the opinion, and we perceive no reason to take back or modify anything therein said.

The prayer of the petition is denied.

Rehearing denied.

101	233
125	417

JAMES G. WRIGHT *et al.*

v.

LIZZIE H. GAY *et al.*

Filed at Springfield Sept. 30, 1881—Rehearing denied January Term, 1882.

1. **INFANTS**—*when not bound by suit in their names.* Where suit in equity is brought in the names of infants by one as their next friend, without any authority other than being administrator of their father's estate, and the proceeding is adverse to them, instead of being in their interest, the decree rendered may be avoided by such infant parties on bill filed to impeach the same.

2. **PAROL EVIDENCE**—*to show a deed is a mortgage.* It is well settled in our courts that parol evidence is admissible in equity to show that a deed in form absolute was intended as a mortgage.

3. **TRUST**—*may be shown by parol.* Where a person at a sale of land becomes the purchaser under the promise to hold for the benefit of the children of the former owner upon being repaid the sum advanced by him, this is sufficient to raise a trust in favor of such children on the ground of fraud, and this may be proved by parol.

4. **STATUTE OF FRAUDS**—*trust by parol.* Where three brothers furnished money to purchase the land of their sister on judicial sale, for the benefit of her children, and one of the brothers bought the land under this arrangement, taking the deed in his own name, to secure himself and two brothers for the money advanced, the promise to hold in trust for the sister's children being verbal only, and it also appearing that the purchaser had made

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and delivered a deed to such children, which was returned to him to get his wife's signature and release of dower, and was retained by him, it was held, that a court of equity would compel an execution of the trust by a conveyance to the children of the sister.

WRIT OF ERROR to the Circuit Court of Coles county; the Hon. J. W. WILKIN, Judge, presiding.

The bill in chancery in this case, filed January 21, 1879, by Lizzie H. Gay, Benjamin F. Gay, and Jacob Douglas Gay, minors, by Lizzie H. Gay, their guardian, alleges that complainants are the only children and heirs at law of William Douglas Gay, deceased; that said Gay died seized of the south-east quarter of section 9, in township 12, north of range 7, east of the third principal meridian, in Coles county, in this State; that on January 21, 1878, a bill in chancery was filed in the names of James R. Gay, John T. Gay, and these complainants, Benjamin F. and Jacob Douglas Gay, by James R. Gay, their next friend, as complainants, and making James G., William M., John W. and Mary R. Wright, parties defendant; that upon January 23, 1878, a decree was entered in that cause, finding that James R., John T. and William Douglas Gay, partners, on December 23, 1864, for the sum of \$3200, purchased the real estate above described; that the land was purchased for the use of said Wrights, their sister's children; that the Wrights had made lasting improvements on the land, had paid the taxes, and \$1400 of the purchase money; that William Douglas Gay had once made a deed of the land to said Wrights, but the same had been returned to him; that said Wrights were entitled to a deed for the land on the payment of \$1800,—and ordering that the master in chancery execute a deed to them on payment of that sum, the bill alleging that thereafter the master made a deed to them in pursuance of the decree. The bill charges that James R. Gay had no authority to use complainants' names, or to act as their next friend, and denies the truth of all the findings of the decree, denies any

Brief for the Plaintiffs in Error.

contract in writing to convey the land to the Wrights, and alleges that if any contract was made, it was void by the Statute of Frauds; alleges that William Douglas Gay paid for the land \$5600, no part of which had been paid back to him; that the Wrights did not have or claim to have any title to the land; that as a mere gratuity said Gay allowed said Wrights to remain upon the premises as his tenants by sufferance, and receive the rents and profits; that said decree was procured by fraud; that said proceeding was a scheme gotten up by James R. Gay, and the said Wrights and others, to injure complainants; that on April 8, 1878, said Wrights filed a bill against one William E. Simms for a conveyance of his right and interest in the land, and that Simms afterward executed a quitclaim deed of the land to the Wrights. The bill prayed that the aforesaid decree and master's deed might be set aside and annulled; that the deed from Simms might be declared to inure to the benefit of complainants; that the title to the land might be decreed to be in complainants, and that the defendants herein, who are the Wrights above named, be perpetually enjoined from asserting any title to the land. Answers were filed denying the allegations of the bill, and full proofs taken, and upon final hearing the circuit court decreed as prayed by the bill.

Messrs. CRAIG & CRAIG, for the plaintiffs in error:

The only thing that can be done under a bill of review, is to set aside the former decree, and nothing more. *Burgess v. Pope et al.* 92 Ill. 259.

A bill to set aside a decree for fraud must state the decree and the proceedings which led to it, with the circumstances of fraud, in detail, on which it is sought to be impeached, and the evidence to support that allegation must be clear and satisfactory. *Boyden v. Reed*, 55 Ill. 459.

Equity holds a person who has not been appointed guardian, responsible, as though he was duly appointed, when he uses

Brief for the Plaintiffs in Error.

the infant's property, as in this case their property was used to make payments of the purchase money. 2 Story's Eq. sec. 1356.

The uncles of the Wrights undertook to attend to their business, treating them as not qualified to take care of themselves. The circumstances created an equitable wardship. *Jacox v. Jacox*, 40 Mich. 480.

When the Gay brothers loaned their money to the natural guardian of plaintiffs in error, it became their money, and where land is purchased with money of one person and the deed taken in the name of another, a trust results in favor of the person whose money is used. *Mathis et al. v. Stufflebeam*, 94 Ill. 486; *Cramer v. House*, 93 id. 504; *Ward v. Armstrong*, 84 id. 156; *Smith v. Smith*, 85 id. 190.

2, That the case is not within the Statute of Frauds, and the trust may be shown by parol evidence, counsel cited *Rann v. Rann*, 95 Ill. 438; *Morgan v. Clayton*, 61 id. 38; *Campbell v. Dearborn*, 109 Mass. 130; *Trotter v. Smith*, 59 Ill. 244; *Strong et al. v. Shea et al.* 83 id. 576; *Seaman v. Cook*, 14 id. 503; 2 Washburne on Real Prop. (3d ed.) 451; *Roller v. Spillman*, 13 Wis. §3; *Seimon v. Schurck*, 29 N. Y. 612; *Purviance v. Holt*, 3 Gilm. 405.

The cases in Illinois in which parol evidence has been received in equity to show that an absolute deed is to secure indebtedness or money loaned, are very numerous: *Delahay v. McConnell*, 4 Scam. 157; *Miller v. Thomas*, 14 Ill. 428; *Cootes v. Woodworth*, 13 id. 654; *Tillson v. Moulton*, 23 id. 648; *Smith v. Sackett*, 15 id. 528; *Davis v. Hopkins*, id. 519; *Bishop v. Williams*, 18 id. 101; *DeWolf v. Strader*, 26 id. 225; *Ewert v. Walling*, 42 id. 453; *Pitts v. Cable*, 44 id. 103; *Owen v. Blake*, 44 id. 135; *Shrup v. Norton*, 48 id. 100; *Sutphen v. Cushman*, 35 id. 186; *Rugard v. McNeil*, 38 id. 400; *Taintor v. Keep*, 43 id. 332; *Parmelee v. Lawrence*, 44 id. 405; *Ennor v. Thompson*, 46 id. 214; *Price v. Karnes*, 59 id. 276; *Card v. Rising*, 62 id. 14; 80 id. 360; 71 id. 155.

 Brief for the Defendants in Error.

Messrs. D. T. & D. S. McINTYRE, for the defendants in error, made the following among other points in their argument:

Benjamin and Jacob D. Gay are not, in any respect, concluded, or their rights affected, by the decree and proceedings sought to be set aside. An infant could sue by *prochein amy* in the first place only by statute, in England, in cases of necessity. The appointment was preliminary to the bringing of the suit. The suit must be for the benefit of, and not adverse to, the infant. Tyler on Infancy, p. 201, sec. 138; *Fischer v. Fischer*, 54 Ill. 231.

A next friend can only claim and pursue the rights of the minor, and is powerless to yield or cede them to others. *Chicago, etc. R. R. Co. v. Kennedy*, 70 Ill. 351.

As to the character of evidence that must be adduced in support of a resulting trust: *Enos v. Hunter*, 4 Gilm. 218; *Lantry v. Lantry*, 51 Ill. 466; *Mahoney v. Mahoney*, 65 id. 407; *Cutler v. Tuttle*, 4 C. E. Greene, (N. J.) 560; *Boyd v. McLean*, 1 Johns. Ch. 591; *Farringer v. Ramsey*, 4 Md. Ch. 37; *Nixon's Appeal*, 63 Pa. St. 279; *Baker v. Vining*, 30 Me. 126; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Wright v. King*, Harr. Ch. 12; *Carey v. Callon*, 6 B. Mon. 44; *Freeman v. Kelley*, 1 Hoff. 90; *Jackson v. Moore*, 6 Cow. 706; *Jackson v. Bateman*, 2 Wend. 570; *Bigelow on Frauds*, 108, 109.

Whether a resulting trust arises, see *Perry v. McHenry*, 13 Ill. 238; *Stephenson v. Thompson*, 13 Ill. 190; *Ficket v. Durham*, 109 Mass. 422; *Hilda v. Shoop*, 4 Md. 465; *Holmes v. Holmes*, 44 Ill. 171; *Nixon's Appeal*, 63 Pa. St. 279; *Botsford v. Burr*, 2 Johns. Ch. 405; *Bigelow on Frauds*, 108, 109.

A subsequent payment of money will not, by relation, attach a trust to the original purchase. *Botsford v. Burr*, 2 Johns. Ch. 405; *Jackson v. Moore*, 6 Cow. 706; *Truman v. Kelley*, 1 Hoff. 90; *White v. Carpenter*, 2 Paige, 218; *Pennock v. Clough*, 16 Vt. 501; *Page v. Page*, 8 N. H. 187; *Conner v. Lewis*, 16 Maine, 268; *Foster v. The Trustees, etc.* 3 Ala. 302;

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1 Leading Cases in Equity, 275; *Tunnard v. Little*, 8 C. E. Greene, (N. J.) 264.

This court has repeatedly said, that when a sale is in form absolute, in order to change its character to that of a mortgage, the evidence must clearly show that it was so intended. *Magnusson v. Johnson*, 73 Ill. 159; *Pierce v. Traver*, 13 Nev. 526; *White v. Kershaw*, 4 Cal. 419.

An agreement, to be sufficient to convert an absolute deed into a mortgage, should be mutual,—that is, the grantor should be bound to pay the debt, and the grantee to reconvey, on payment. *Holmes v. Grant*, 8 Paige, 243; *Glover v. Payne*, 19 Wend. 518; *Robinson v. Cropsey*, 2 Edw. Ch. 138.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

The decree of January 23, 1878, in the case of the Gays against the Wrights, as an adjudication of the rights of the minor children, Benjamin and Jacob Douglas Gay, we do not regard as entitled to any consideration. The proof very clearly shows that James R. Gay had no authority or right to bring the suit for them as their next friend. He does not pretend to have had any other than as arose merely from his being administrator of the estate of their deceased father. The proceeding did not purport to be in the interest or for the benefit of the minor children, but it was for the benefit, solely, of the other co-complainants, James R. Gay and John T. Gay, in order to enable them to realize from the land a certain sum of money alleged to have been advanced by them, with William Douglas Gay, as partners, toward the purchase of the land, for the payment of which the land was alleged to stand as security, the title for that purpose having been taken in the name of William Douglas Gay. The interest of the minor children of William Douglas Gay was adverse to, instead of in favor of, the proceeding, and their place in the suit was as defendants, so that they could have been served with process as such, and have had an opportunity to defend.

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We should have been satisfied with the decree here had it merely set aside that former decree, and pronounced it of no force as affecting the rights of these minor children. But the bill is not one merely to impeach the former decree, but it alleges the entire right and title to be in the complainants, denies there to be any in defendants, and asks not merely to have that decree and the master's deed thereunder set aside, but to have the quitclaim deed of Simms to the defendants set aside, that the title to the land be decreed to be in the complainants, and that defendants be perpetually enjoined from asserting any title thereto; and upon full proofs taken as to the respective rights of the parties in the land, the court decreed as the bill asked, to the full extent. We have then to inquire further, whether, rejecting the former decree as of any force, the proofs otherwise sustain the decree as to the full rights of the parties.

There is no controversy in regard to the facts. It appears that in 1855 one William E. Simms sold the land to R. H. Wasson, trustee for Mrs. Wright, the mother of the defendants, taking notes for the purchase money, and giving a written contract to convey on payment of the purchase money; that Mrs. Wright and her husband, with the defendants, their children, have been in possession of the land, living on it, and making improvements, ever since; that default having been made in the full payment of the purchase money, one Troutman, to whom Simms had assigned said notes and contract, filed a bill in chancery to subject the land to the payment of the notes, and a decree was rendered for the sale of the land for that purpose, and a sale and deed of it were made by J. R. Cunningham, a commissioner appointed, to William D. Gay, for \$5600, as reported by the commissioner, in December, 1864. This sum seems to have been in excess of the amount of the debt due Troutman by some \$1300, which Troutman remitted. This is the purchase and title of William D. Gay, under which com-

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plainants claim as his heirs. All that William D. Gay paid toward the purchase of the land was some \$2200 or \$2300, and under the following circumstances: The three Gays,—John T., James R. and William D., brothers of Mrs. Wright,—were partners together, and resided in Kentucky. Prior to the sale there was an agreement made between the three Gays and Mr. Wasson, the trustee for Mrs. Wright, that the Gays would purchase this land, on which the Wrights were residing at the time, for the benefit of the Wright children. The three Gays borrowed the money, some \$2200 or \$2300, from a sister, Mrs. Bird, they giving their note for it, which John T. and James R. afterward paid. William D. was sent to Illinois to make the purchase for the benefit of the children, and take the title in his own name for the security of the money to the Gays.

There can be no doubt, from the evidence, that such was the transaction in fact, and the only question in the case is the legal one, whether the arrangement for the purchase of the land for the benefit of the defendants, not being in writing, is void under the Statute of Frauds.

It is very well settled, by decisions of this court, that oral evidence is admissible in equity to show that an absolute deed was intended as a mortgage. (*Reigard v. McNeil*, 38 Ill. 400, *Ruckman v. Atwood*, 71 id. 155, *Strong v. Shea*, 83 id. 575, and many other cases.) The money was clearly advanced by the Gays for the purchase of the land for the benefit of their sister's children, the defendants. The uncontradicted testimony of James R. Gay is, "the title was taken in his (William D. Gay's) name, because he was a single man,—was not made to Wrights because we wanted to secure the money we put in it." This shows that the deed to William D. Gay, though absolute in form, was but as a security to secure to the Gays the repayment of the money which they had advanced for the children.

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Again, William D. Gay went from Kentucky to Illinois to attend the sale of the land, under an agreement with his two other brothers, to purchase the land for the benefit of their sister's children. Edwin Wright testifies that William D. Gay "did not purchase it (the land) for himself; he purchased it for the benefit of my children, who were also his sister's children. He stated that in the presence of several persons on the day of sale. It was a distinct understanding between him and Troutman before the sale, that he would purchase the land in controversy for the benefit of my children." It would, under such circumstances, be a fraud upon the other two brothers, as well as others, for William D. Gay, or his heirs under him, to set up right in him, and claim to hold the property as his own, as having been purchased for his own benefit absolutely.

In 2 Washburne on Real Property, (3d ed.) p. 451, after discussing the rule under the Statute of Frauds that no trust can be raised by mere agreement, unless in writing, the author adds: "If a grantee obtain a deed by means of promises to hold the land for another, this is sufficient to raise a trust in favor of the latter, on the ground of fraud, and this may be proved by parol." To the like effect is *Roller v. Spillman*, 13 Wis. 33, and see *Dennis v. McCagg*, 32 Ill. 429.

It further appears that William D. Gay, in his lifetime, did make a deed to the defendants for the land, and sent it to them, and that they had it in their possession some months, and that on the advice of their father it was sent back, because the signature of Gay's wife was not to the deed.

The decree which was rendered in this case must be reversed, and, strictly, complainants would be entitled to a decree setting aside the former decree in the other case, and the master's deed thereunder, in accordance with the view above expressed upon that subject; but as that would be of

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no practical benefit to complainants, under the proofs in this case showing defendants' right to the land, we think that in the interest of both parties, and to end litigation, there should be a decree dismissing the bill, and ordering equitably as to costs.

Decree reversed.

DOMINIC BREIT *et al.*

v.

JOHN S. YEATON *et al.*

Filed at Springfield Sept. 30, 1881—Rehearing denied January Term, 1882.

1. **PARTIES**—*who are necessary parties—and when one not a party may be bound by a decree.* Where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not necessary to bring both before the court to bind them by the decree.

2. If there is no tenant in tail in being, the first person in being entitled to the inheritance should be made a party to a bill in chancery affecting the title to land, and if there be no such person in being, then the tenant for life; and in such cases the decree will bind the other persons not in being.

3. **SAME**—*as to after-born children.* On bill by husband and wife, against trustees, to reform a marriage settlement made by the wife in contemplation of marriage, on the ground of mistake, her children, who are to take the estate in fee after the death of the party holding for life, are necessary parties. They, taking as purchasers, will not be affected by any decree to which they are not made parties, even though such decree is rendered before their birth.

4. **SETTLEMENT in anticipation of marriage**—*of restrictions as to alienation or disposition.* A woman, prior to marriage, may place such restrictions as she pleases upon the future alienation or disposition of her property, not forbidden by or contrary to the policy of the law; and when such restrictions are made to protect the property and herself from the influence of her husband, they will be regarded as of substance, and not of mere form.

5. **POWER OF DISPOSITION by married woman—by deed or will—as to the manner of execution.** Where a marriage settlement, made by a woman in view of marriage, places her property in the hands of trustees, the interest and dividends to be paid to the husband during the joint lives of the parties,

101	242
120	152
101	242
144	247
101	242
155	648
44a	492
101	242
157	631
46a	171
101	242
164	180
101	242
168	603
70a	444
101	242
82a	665
101	242
205	1255
101	242
211	489

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and balance in such part and proportions, manner and form, as she shall, from time to time, during coverture, limit or appoint, by any writing or writings under her hand and seal, attested by three or more credible witnesses, or by her last will and testament, to be by her signed, sealed, etc., in the presence of the like number of witnesses, the power of appointment can not be exercised by her by an ordinary deed of conveyance, simply acknowledged as other deeds, but it must be as directed in the articles of settlement.

6. When a woman, just before her marriage, with the consent of her intended husband, transfers her property, consisting of bank stock, to trustees, in trust for the husband during their joint lives, and for herself upon his death, in case she survives, but if she dies first, the remainder to her heirs at law, reserving a power of disposition, her power does not depend upon the statute, but upon the settlement, and she must pursue the mode she has appointed for the exercise of the power.

7. *SAME—of the effect of the Married Woman's act.* The Married Woman's act of 1861, conferring upon married women power to own and control property, as if sole, affects only the separate estate of married women derived in the mode provided therein. It does not apply to property conveyed by her to trustees before marriage, to be held upon certain trusts named in the conveyance, and has nothing to do with the exercise of powers reserved by her in a marriage settlement.

8. *SAME—effect of a deed by the wife to her husband.* A deed by a wife and her trustee, in 1868, of property conveyed by her to the trustee before marriage, to her husband, is void as a conveyance, and it is also void as an execution of the power of appointment, if not attested by three or more credible witnesses, as required in the conveyance to the trustee, reserving the power of disposition by the wife.

9. *SAME—aiding defective execution of power, in equity.* A defective execution of a power by a wife can not be aided in equity, in favor of her husband. The restrictions as to the form and mode of exercising such power are made for the protection of the wife against the husband, and are matters of substance, and not of mere form. Equity will never aid the execution of a power when the defect is a matter of substance.

10. *TRUSTEE'S DEED—condition precedent—how far essential—effect of recitals in the deed.* A party claiming title under a trustee's deed must show that every condition precedent to the vesting of the estate has been complied with, and where the power of a trustee to convey depends upon a written request of another, under seal, and attested by three or more credible witnesses, it is incumbent on those claiming under the deed of the trustee to show that such a written request was executed and attested, as required. The evidence of the performance of the condition precedent may probably be preserved by recitals in the trustee's deed.

11. *EVIDENCE—of the use of trust funds, by recital in deed.* The recital in a deed of a husband, conveying real estate to the trustee of his wife, that

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the wife had directed a portion of the proceeds of the sale of her stock by the trustee to be invested in the same real estate, instead of stating that the investment had been made, is *prima facie* evidence against the husband, and those claiming under him, that a portion of the proceeds of such bank stock was invested in such land, and the use of the deed, as evidence of this fact by the *cestuis que trust* of the bank stock, or its proceeds, do not make such deed binding and conclusive upon them for all purposes.

12. **TRUST**—*charging property purchased with trust funds with original trust.* The doctrine is well settled that a *cestui que trust* may pursue the proceeds of trust property, and charge with the original trust any property in which they may be invested, as against all who have actual or presumptive notice of the trust.

13. **SAME**—*charging property bought with trust funds, is optional with cestui que trust.* Where property is bought with trust funds, in violation of the trust, a trust will not absolutely and at all events attach to the property purchased. The *cestui que trust* will have the right to have it attach, or he may repudiate the trust, and disclaim any title to the property, and proceed upon any other remedies he is entitled to, either *in rem* or *in personam*.

14. **SAME**—*right to charge property with, must be exercised in reasonable time.* In case of an optional right to defeat or divest a title, or to charge property with trusts, the party entitled to the option must, when aware of his right, exercise it promptly, and not, by delay and inattention, give reason for the belief that he has abandoned it.

15. **NOTICE**—*as to use of trust funds—recital in deed.* Where a deed made by a husband to a trustee recited that he had invested certain trust funds of his wife in the purchase of the land, and therefore conveyed such land to the trustee, to be held subject to the original trust, as modified by a decree of court, and he afterwards, without proper authority, procured a conveyance from the trustee to himself, of the land, it was held, that the recitals in the deed to the trustee (which deed was recorded) were sufficient to put purchasers from the husband on inquiry, and afforded notice that he held the lands in trust.

16. **SAME**—*as to condition precedent to power to convey—as shown by the face of the deed.* A deed from a wife and her trustee to her husband, for the expressed consideration of \$5, for valuable real estate, not purporting to have been made upon the written request of the wife, attested by three witnesses, as required by the instrument creating the trust, or pursuant to any decree of court, when recorded is notice of its imperfection to all the world.

17. **PARTITION**—*effect as to parties having right to property as cestui que trust.* Where a trust attaches to land held in common, a subsequent partition by the holder of the legal title will give no new title, but will only change the title to one in severalty, and the trust may be enforced against the part so set off in severalty.

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18. *SAME—adjusting conflicting titles.* On bill in equity for the partition of lands, the court is invested by statute with power to adjust all conflicting titles, and it may set aside conveyances under which adverse titles are claimed.

19. *LACHES—when such as to defeat equitable relief.* Where a party has knowledge of the facts entitling him to equitable relief, and rests, without taking any steps to assert his rights, for nearly seven years, giving no excuse for his delay except ignorance of the law, his *laches* will be such as to bar his right to relief. It is otherwise when the party is ignorant of the facts affecting his rights, until shortly before suing.

20. *IMPROVEMENTS—allowed only to extent of enhanced value of land.* On setting aside conveyances of land and vesting the title in the complainant, it is proper to decree the payment of the amount of the enhanced value of the premises by reason of the improvements made under belief of title, less the value of the use and occupation of the premises. Improvements not enhancing the value of the land should not be required to be paid for.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

This was a bill in chancery, brought in the Superior Court of Cook county, on March 19, 1879, by John Southgate Yeaton, Alexina M. Yeaton, Ruth Yeaton Stuart, William C. Yeaton, Jr., and Mary F. Yeaton, against Dominic Breit, Robert Murray, Frederick E. Bradley, William C. Yeaton, Sr., Lucia C. Yeaton, Charles E. Stuart, and many others, claimants, parties interested in the lands in controversy, praying that William C. Yeaton, and those claiming under him, may be ordered to convey to the heirs at law of said Mary Frances Yeaton, deceased, the legal title to the premises, and for partition, etc.

The following agreement, in contemplation of marriage, was entered into at the time and by the parties therein named:

"Indenture dated October 27, 1849, between William C. Yeaton, of the first part, Mary Frances Du Val, of the second part, and Frederick W. Southgate and George W. Cowdery, of the third part:

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"Whereas, a marriage is shortly intended between said William C. and Mary Frances, and said Mary Frances is possessed of certain bank stock (describing same); and whereas, it has been agreed that said William C. shall, after said marriage, receive and enjoy, during the joint lives of said William C. and Mary Frances, the dividends or interest of said stocks, and also that said stocks, after the decease of such of them as shall first die, shall be at the sole and only disposal of said Mary Frances, notwithstanding her coverture:

"Now, in pursuance of the before recited agreement, and in consideration of \$5 paid to said Mary Frances by said Southgate and Cowdery, the said Mary Frances, by and with the consent of said William C., hath granted, etc., and by these presents doth grant, etc., to said Southgate and Cowdery, their executors, etc., all of said bank stocks, to have and hold said stocks, to said Southgate and Cowdery, their executors, etc., upon such trusts, nevertheless, and to and for such intents and purposes, and under such provisions and agreements, as are hereinafter mentioned, that is to say, in trust for the said Mary Frances and her assigns until the solemnization of said marriage, then upon trust that said Southgate and Cowdery, their executors, etc., shall pay to said William C. Yeaton, during the joint lives of said William C. and Mary Frances, all the interest or dividends of said stocks, to and for his own use and benefit; and after the decease of such of them, the said William C. and Mary Frances, as shall first die, then upon trust that said Southgate and Cowdery, their executors, etc., shall and do assign, transfer and pay over all of said bank stocks to said Mary Frances, in case she survives said William C. Yeaton, but if she die before him, then unto such person or persons, and at the time and times, and in such part and proportions, manner and form, as said Mary Frances shall, from time to time, notwithstanding her coverture, by any writing or writ-

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ings under her hand and seal, attested by three or more credible witnesses, or by her last will and testament in writing, to be by her signed, sealed, published and declared in the presence of the like number of witnesses, direct, limit or appoint; and in default of such appointment or will, then the said Southgate and Cowdery, their executors, etc., are to pay the dividends arising from the said stocks to the natural or qualified guardian of the children that may be issue of said marriage, and on their coming of age, or their being married, to transfer the said stock to them in equal proportions; but in the event of there being no issue, or the same dying before they come of age, or before they are married, then to transfer the same to said William C. Yeaton, but in the event of the decease of said William C. Yeaton before the same shall be actually conveyed and paid over to him, then to such person or persons as would be the legal representatives of said Mary Frances by the statute for the distribution of intestate estates.

"In witness whereof said parties have hereto set their hands and seals, etc.

WILLIAM C. YEATON, [Seal.]

MARY FRANCES DU VAL, [Seal.]

FREDERICK W. SOUTHGATE, [Seal.]

G. W. COWDERY." [Seal.]

The marriage contemplated was solemnized shortly thereafter, and on the 15th day of November, 1851, said William C. Yeaton and Mary Frances, his wife, filed their bill in the circuit court of Alexandria county, Virginia, against said Southgate and Cowdery, alleging therein said marriage settlement and marriage, and further, that said settlement did not express the intention of the parties thereto, as it did not give the trustees authority to change the investment in the stocks therein mentioned; that some of the stocks were much less productive and less secure than other property which could be procured and substituted; that the Patriotic Bank stock

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had paid no interest for several years, and that said Patriotic Bank, as well as the banks of Metropolis and Washington, had not the advantage of a common charter; that the interest of all then or thereafter likely to be concerned, required that said trustees should have power to make a prudent change in said investments, either to real estate or other more secure and valuable bank or State stock, whenever directed by said William C. Yeaton and his wife, Mary Frances; and alleging further, that the failure to authorize and require said trustees to make such change, when occasion required, was the result of misapprehension and mistake at the time of making said deed, and that, until a short time before filing said bill, said William C. Yeaton and his said wife were under the impression that such authority was expressed in said deed; and alleging further, that such authority probably resulted to said trustees by implication, but that they were unwilling to assume the responsibility of its exercise, unless under the direction of a court of chancery; and alleging further, that it was prayed in said bill, so filed in said Alexandria county circuit court, that the intention of said Yeaton and his wife might be carried out, and that it was also prayed that the powers of said trustees might be declared to enable them to sell said stocks, and reinvest the proceeds for the benefit of said Yeaton and his wife, to be subject to the same conditions, uses and trusts as were specified in said deed; and alleging further, that it was also prayed that said trustees might be required to make such sale as to any of said stock, and to reinvest the proceeds of such sale, as said Yeaton and his wife might desire, in other good bank stock, State stock, or in real estate, and such authority to be continued and exercised as, from time to time, might become expedient and desirable for the interest of all concerned.

Southgate and Cowdery answered this bill, jointly and severally, wherein they admitted the execution and delivery of said settlement, but alleging that it was made for the special

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benefit of said Mary Frances, and therein stated that if it was deemed beneficial for the interest of said Mary Frances, they were willing that any decree might be entered in the premises as would carry out the wishes of said Mary Frances and her said husband, they, the said trustees, being relieved from all responsibility in the execution of said decree. On the same day the following decree, omitting the caption, was rendered in said cause:

"The answer in this cause having been filed, and the cause set for hearing, by consent of parties, and the same now coming on for final decree on the bill, answer, and other proofs filed therewith, the court, on consideration thereof, doth now here, this 15th day of November, 1851, adjudge, order and decree that the defendants, trustees in the bill named, or the survivor of said trustees, do hereafter, on the written request of said complainants, W. C. Yeaton and wife, sell and dispose of the various stocks (or such portions as may be named in such request) contained in the marriage settlement between the said Yeaton and his wife, and invest the proceeds arising from such sale in such other property as the said Yeaton and wife may desire, the property then procured to be held by said trustees for the benefit of the wife of said Yeaton, as prescribed in said settlement, and subject to said trust; such power of sale and re-investment to be and continue in said trustees and the survivor of said trustees, to be exercised by them, from time to time, as may be just and expedient, and in accordance with the wishes of the parties concerned in interest,—the sales and re-investments thus made to be reported to this court regularly, as from time to time they may occur. But before the said trustees shall proceed to act under this decree, they shall give bond and security in the sum of \$1000, to be approved by the clerk of this court, conditioned for the faithful performance of their duties under this decree."

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Afterwards, William C. Yeaton executed and delivered to the grantee therein named, the following deed:

"Indenture made this 16th November, 1864, between William C. Yeaton, of the first part, and George W. Cowdery, (surviving trustee of Mary Frances Yeaton, wife of said William C. Yeaton, formerly Mary Frances Du Val,) of the second part. (Here recites the decree, in substance shown above.)

"And whereas, on the written request of said William C. Yeaton and wife, said stocks were sold, and a report of such sale returned to said court; and whereas, said Mary Frances has directed that a portion of the proceeds of sale of said stocks shall be invested in the real estate hereinafter described: Now, this indenture witnesseth, that said William C. Yeaton, in consideration of the premises, and in consideration of \$9000, part of the proceeds of the sale aforesaid, to him in hand paid by said Cowdery, surviving trustee, the receipt whereof is acknowledged, does alien, remise, convey, etc., unto said Cowdery, surviving trustee, all the said William C. Yeaton's right, title and interest in and to the following real estate in Cook county, Illinois, (after naming other property): Outlot 17, of Canal Trustees' subdivision of section 33, town 39 north, range 14 east of the third principal meridian, which lot was conveyed to the said Yeaton and others by deed from James Birney and wife, dated May 8, 1857, of record in Cook county, in Book 142 of Deeds, page 321; to have and to hold all the interest of said William C. Yeaton in the above mentioned and described premises, to said Cowdery, surviving trustee, as aforesaid, in trust, however, for the use and benefit of said Mary Frances Yeaton, in accordance with the marriage settlement aforesaid, and with all powers of sale and substitution under the decree aforesaid.

"In witness whereof, etc., said first party sets his hand and seal, etc.

WILLIAM C. YEATON." [Seal.]

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And afterwards, the following was executed and delivered to the grantee therein :

"Indenture made 6th of November, 1868, between Mary Frances Yeaton, wife of William C. Yeaton, of the first part, George W. Cowdery, surviving trustee, etc., party of the second part, and said William C. Yeaton, party of the third part :

"Witnesseth: that the said party of the first part, in consideration of \$5 paid by said party of the third part, the receipt whereof is acknowledged, and the said party of the second part, at the written request of said party of the first part, have aliened, etc., and do alien, remise, release, convey and confirm unto said party of the third part, his heirs and assigns forever, all the estate, right, title, etc., of the said parties of the first and second parts, of, in and to the following real estate in Cook county, Illinois: Out-lot 17, in Canal Trustees' subdivision of section 33, town 39 north, range 14 east of the third principal meridian, and other property, it being the same property which was, by deed dated 16th November, 1864, conveyed by said William C. Yeaton to the said George W. Cowdery, surviving trustee, to have and to hold the same to said party of the third part, his heirs and assigns forever.

"In witness whereof, said parties of the first and second parts set their hands and seals, etc.

M. F. YEATON, [Seal.]

G. W. COWDERY, [Seal.]

Surviving Trustee."

The original interest of William C. Yeaton in this and other lots was that of an undivided one-half, and one Tazewell Taylor was the owner of the other undivided half, and on the 30th of November, 1869, a partition was effected of the lots, between Yeaton and Taylor, whereby Taylor conveyed to Yeaton his half to the lots in controversy, and Yeaton conveyed to Taylor his half in other lots.

Brief for the Plaintiffs in Error.

About the 15th of July, 1871, Mary Frances Yeaton died intestate, leaving her surviving, her husband, William C. Yeaton, and the complainants, J. Southgate Yeaton, Alexina M. Yeaton, Ruth Y. Stuart, William C. Yeaton, and Mary F. Yeaton, and the defendant Lucia Chauncey Yeaton, her children and heirs at law, all of whom are issue of the said marriage between her and William C. Yeaton. Prior to her death, no direction, limitation or appointment of her interest in said premises, or any part thereof, except as before stated, was made. William C. Yeaton employed one Samuel Geber, a real estate agent in Chicago, and through him, on the 5th of July, 1872, he sold and conveyed certain of the property in controversy. Subsequently, other sales and conveyances were made. Prior to this, and before the death of his wife, William C. Yeaton had mortgaged certain portions of the property to raise money, etc.

Bill was filed by complainants for a conveyance by Yeaton, and others claiming under him, of the property, and for partition thereof. Answers were filed, and the cause was heard on bill, answers and proofs, and the court thereupon decreed in conformity with the prayer of the bill. The present writ of error is prosecuted by defendants below.

Mr. GEORGE W. SMITH, for the plaintiffs in error:

"Personal property," said Lord Thurlow, in 1789, in *Fettiplace v. Gorges*, 1 Ves. Jr. 49, "the moment it can be enjoyed must be enjoyed with all its incidents." So, when a married woman is allowed to enjoy any property as a *feme sole*, the privilege necessarily implies a *jus disponendi*. As the separate use can not exist but in the married state, so neither can the restraint upon anticipation. There is no form of limitation whereby a single woman can be prevented from even squandering her income or dissipating her means. In this respect she stands on the same footing as a man. *Brandon v. Robinson*, 18 Ves. 429.

Brief for the Plaintiffs in Error.

The case of *Swift v. Castle*, 23 Ill. 209, was decided in 1859. The court there reasons from the common law incapacity of a married woman. See 1 Sugden on Powers, (sec. 3, par. 29, marg. p. 200, 3d. ed.) 253. But under the statutes of 1861, 1867, 1869 and 1874, a new policy was adopted. Under these the wife holds an absolute legal estate as against her husband, the same as a *feme sole*. *Patten v. Patten*, 75 Ill. 446.

A power to be executed in writing, under the party's hand and seal, attested by three credible witnesses, is well executed, though the attestation clause signed by the witnesses, only certifies to the sealing and delivery, and not to the signing. *Ladd v. Ladd*, 8 How. 10.

As to the proper execution of powers, counsel cited *Knowles v. Knowles*, 86 Ill. 1; *McClintie v. O'Chiltree*, 4 W. Va. 249; *West v. West*, 3 Rand. 373; *Williamson v. Beckman*, 8 Leigh, 20; *Justis v. English*, 30 Gratt. 565; *Cocker v. Quayle*, 1 Russ. & Mylne, 535.

As to the power of the court to reform marriage settlements, counsel, after reviewing the cases relied on by defendants in error, cited *Barrow v. Barrow*, 18 Beav. 532; *Sampayo v. Gould*, 12 Simon's Ch. 426; *Trever v. Trever*, 1 Eq. C. Ab. 387; *Elton v. Elton*, 27 Beav. 634; *White & Tudor's Leading Cases*, 36; 1 Story's Eq. Jur. secs. 160, 161, and notes; *Metropolitan Bank v. Godfrey*, 579.

In suits to enforce marriage settlements, it may be that children living are necessary parties, not, however, those not *in esse*. Story's Eq. Pl. secs. 145, 792.

As to aiding the defective execution of powers, counsel cited 1 Sugden on Powers (3d Am. ed.) 300; *Pool v. Potter*, 63 Ill. 533; *Marshall v. Stephens*, 8 Humph. 159.

If defendants in error wished to avoid the Alexandria decree, or the conveyances by their father, why did they not act earlier? They should have been vigilant to ascertain their rights, and to prevent other persons from being preju-

Brief for the Plaintiffs in Error.

diced. *Hamilton v. Lubukee*, 51 Ill. 415; *Bush v. Sherman*, 80 id. 160; *Williams v. Rhodes*, 81 id. 571.

As to the allowance for improvements, counsel cited *Louvalle v. Menard*, 1 Gilm. 39; *Mahoney v. Mahoney*, 65 Ill. 406; *Harper v. Ely*, 70 id. 581.

Mr. W. W. EVANS, also for the plaintiffs in error:

1. No trust funds were ever, in fact, invested in the lands in question. It is claimed that defendants in error are estopped from denying the recitals in Yeaton's deed of 1864. The rule that parties are bound by the recitals contained in deeds in their chain of title, has reference only to those claiming under such chain, in privity with those sought to be bound. 2 Washburne on Real Prop. 463; *Carver v. Jackson*, 4 Pet. 83.

2. The sale of the stocks was authorized by the decree of the Alexandria circuit court. The defendants in error will not be allowed to profit by the decree so far as favorable, and to reject it where unfavorable.

3. A court of chancery has general power to amend a defective instrument of any nature. No exception is made in case of marriage settlements. Equity will rectify a settlement where a mistake has been made in it. Sugden on Powers, 560; Perry on Trusts, sec. 365; *Sampayo v. Gould*, 12 Sim. Ch. 426.

4. The objection that the Yeaton heirs were not born, and therefore not parties, can not have weight, as that would involve delay in reforming such instrument, till the "decease of a parent," as is suggested. However erroneous the decree may be, it would have force until reversed. It can not here be questioned collaterally.

5. It is a fair presumption that the trustee executed his trust in the manner required by the marriage settlement. *Marshall v. Stevens*, 8 Humph. 159; *Munn v. Burges*, 70 Ill. 614.

Brief for the Defendants in Error.

6. Mrs. Yeaton could make a conveyance of her interest in her own right, and her joining in the deed with the trustee, who held the legal title, was a sufficient request, in writing, for him to convey. *Knowles v. Knowles*, 86 Ill. 2.

Mr. JOHN P. WILSON, also for the plaintiffs in error :

An undivided one-half of the lots in question was never owned by the trustee, through whom defendants in error derive their claim of title.

Messrs. G. & W. GARNETT, for the defendants in error :

The power of disposition reserved to Mrs. Yeaton could be exercised only in the mode and manner specified in the settlement. *Swift v. Castle*, 23 Ill. 209; *Conkling v. Doul et al.* 67 id. 355; *Yeaton v. Yeaton*, 4 Bradw. 479; *Montgomery v. Agricultural Bank*, 10 S. & M. 566; *Doty v. Mitchell*, 9 id. 435; *Ladd v. Ladd*, 8 How. 10; *Cocker v. Quayle*, 1 Russ. & Mylne, 535; *Hopkins v. Myall*, 2 id. 86; *Maut v. Leith*, 15 Beav. 524; *Whiting v. Rust*, 1 Gratt. 483; *Burdett v. Spillsbury*, 6 M. & G. 407; *McClintie v. O'Chiltree*, 4 W. Va. 249.

Where there is a limitation over to the children in default of appointment, the wife is a *feme sole* only so far as she is made by the settlement. *Mores v. Huish*, 5 Ves. Jr. 692; *Whistler v. Newman*, 4 id. 129; *Richards v. Chambers*, 10 id. 580; *Cocker v. Quayle*, 1 Russ. & Mylne, 535; *Hopkins v. Myall*, 2 id. 86; *Maut v. Leith*, 15 Beav. 524.

The object of the Married Woman's act of 1861 was not to enable married women to destroy their marriage settlements by which their property had already been effectually protected for the benefit of themselves and their children. *Watson v. Bonney*, 2 Sandf. 412.

It has been uniformly held by this court, that the law of 1861 did not authorize a married woman to convey her separate estate, acquired under that act, without her husband joining in the deed. *Brooks v. Kearns*, 86 Ill. 547; *Elder v.*

Brief for the Defendants in Error.

Jones, 85 id. 384; *Bressler v. Kent*, 61 id. 426; *Cookson v. Toole*, 59 id. 521.

Lands purchased with the proceeds of sale of the separate personal estate of the wife, are also her separate estate, and subject to the same rules as the original personal estate. *Kirkpatrick v. Buford et al.* 21 Ark. 268; *Merrit v. Lyon*, 3 Barb. 110.

The future issue of the marriage had a contingent future estate, which could not be impaired or divested by any decree. *Watson v. Bonney*, 2 Sandf. 417; *Kinnard v. Daniel*, 13 B. Mon. 497; *Richards v. Fitzgerald*, 9 Irish Eq. 495; *Richards v. Chambers*, 10 Ves. Jr. 580; *McBride v. Greenwood*, 11 Ga. 379; *Gorin v. Gordon*, 38 Miss. 205; *Parker v. White*, 11 Ves. 219.

Where a trustee has power to sell upon the written request of the wife, a gift of it to the husband is void, though made upon the written request of the wife. *Morgan v. Elam*, 4 Yerg. 375; *Dunn v. Dunn*, 1 S. C. 354; *Ellis et al. v. Baker*, 1 Rand. 47.

A defective execution of a power will not be aided in favor of the husband of the donee of the power. 2 Sugden on Powers, 84, sec. 13.

To entitle a purchaser to such aid, he must be a purchaser from the donee of the power. 2 Sugden on Powers, 87, sec. 24. See, also, *Justis v. English et al.* 30 Gratt. 565; *Thackwell v. Gardiner*, 5 DeG. & S. 58; *White & Tudor's Leading Cases* in Eq. 373.

If there was any request executed other than the deed itself, the burden of proving it is on the plaintiffs in error. *Williams v. Peyton*, 4 Wheat. 79.

Yeaton, and those claiming under him, are estopped from denying the consideration of the deed of 1864. *Kimball v. Walker*, 30 Ill. 511; 1 Greenleaf on Evidence, sec. 211.

The deed of 1864 being on record, and referring to the trusts of the marriage settlement, was ample notice to purchasers

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from Yeaton. *Railroad Co. v. Durant*, 5 Otto, 579; *Duncan v. Jandon*, 15 Wall. 175; *Shaw v. Spencer*, 100 Mass. 382; *Oliver v. Piatt*, 3 How. 333; *Bellos v. Lloyd*, 2 Watts, 401; *Justis v. English*, 30 Gratt. 575; 3 Washburne on Real Prop. 292, sec. 63.

This suit is fully justified by sec. 39 of the Partition act, which authorizes courts of equity to adjust all conflicting titles. *Henrichsen v. Hodgen*, 67 Ill. 179; *Harrer v. Wallner*, 80 id. 197.

There is no objection to a bill to remove a cloud, containing a prayer for partition; and a bill for specific performance may also embrace a prayer for partition. *Ross v. Cobb*, 48 Ill. 112; *Williams et al. v. Wiggand et al.* 53 id. 233.

MR. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The question first in order, upon this record, is, does the decree of the circuit court of Alexandria, Virginia, bind the defendants in error? The answer depends upon whether there was jurisdiction over the persons, for there is no controversy in regard to the jurisdiction of the court over the subject matter. None of the defendants in error were made parties to that proceeding, and none of them were born at the time the decree was rendered, except J. Southgate.

Counsel for plaintiffs in error seem to concede that J. Southgate should have been made a party, but contend that it was competent to render a decree in that proceeding binding upon those not in being, and they cite Story's Equity Pleadings, secs. 145, 792, where it is said: "As it is sufficient to bring the first tenant in tail before the court, if in being, whether he be plaintiff or defendant in the suit, so, if there be no such tenant in tail in being, the first person in being entitled to the inheritance should be made a party, and if there be no such person in being, then the tenant for life; and in such cases the decree made will bind the other persons not in being." This is upon the principle that where

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the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not necessary to bring both before the court. MARSHALL, Ch. J., in *Hopkirk v. Page*, 2 Brock. 42.

Manifestly, then, the rule can have no application here. There is here no prior estate of inheritance, and the interests of the heirs at law are not involved in that of another, but, on the contrary, are adverse to all other interests to be derived under and by virtue of the power. The decisions hold that the heirs at law, in cases like the present, are purchasers, and no decree will affect their rights to which they have not been made parties. *Richards v. Chambers*, 10 Ves. 580; *Parker v. White*, 11 id. 219; *Richards v. Fitzgerald*, 9 Irish Eq. 495; *Kinnard v. Daniels*, 13 B. Mon. 497; *Graham v. Houghtalin*, 1 Vroom, 552; *Watson v. Bonney*, 2 Sandf. (Sup. Court,) 417; *McBride v. Greenwood*, 11 Ga. 379; *Gorin v. Gorin*, 38 Miss. 205.

But counsel contend, that even if this view be true, still Mrs. Yeaton might exercise her power of appointment in regard to the trust property by an ordinary deed of conveyance, simply acknowledged as other deeds, and without regard to the requirement in the deed of settlement that it should only be by a "writing or writings under her hand and seal, attested by three or more credible witnesses, or by her last will and testament in writing, to be by her signed, sealed, published and declared in the presence of the like number of witnesses." This, we think, is very clearly incorrect. A woman contemplating marriage, at the time and place this settlement was made, and having an estate of her own, might, and oftentimes, we conceive, would, have had a two-fold object in view in tying up her property by articles of marriage settlement: first, of course, to keep the property from passing, by virtue of the husband's marital rights, directly under his control; and secondly, to place the property beyond her own con-

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trol during coverture, absolutely or conditionally, and subject to such restrictions as would reasonably protect her against the improper influences of her husband. And the articles themselves here furnish ample evidence of what was the controlling motive. We think it manifest it was to disable Mary Frances, during coverture, to alienate or dispose of the property, except under such restrictions as was thought would reasonably protect her against the improper influences of her husband.

In *Swift et al. v. Castle*, 23 Ill. 209, it was held a married woman can only convey her trust property (as a marriage settlement) in the manner authorized, and for the purposes specified, in the deed creating the trust; and the same rule, obviously, must apply to the exercise by her of a power of appointment under articles of marriage settlement. In proof of this the court there said: "When the instrument creating the trust confers upon her" (*i. e.* a married woman) "power to sell or dispose of the trust estate, she, for the purpose of executing the trust, is an attorney in fact, and all her acts, to be legal, must, as those of any other attorney in fact, strictly conform to the power delegated, and any deviation from its provisions will render the act void for want of authority. No reason is perceived why a court of equity should confer upon her additional powers to those contained in the instrument creating the trust, more than it should upon any other attorney in fact. To permit her to exercise such additional powers is only authorizing her to defeat the object of the trust, and to disregard the intention of the parties, which should control in this as in all other contracts, when it can be ascertained from the instrument." And again: "When the instrument creating the trust provides that it may be disposed of by one mode, it excludes all others. * * * It appears to us that the true rule is, that the *cestui que trust* should be restrained to the acts

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authorized by the declaration of the trust, and that all beyond the power thus delegated should be held to be void."

In *Justis v. English*, 30 Gratt. 565, the marriage settlement gave Mrs. Leber power to appoint "by any writings under her hand and seal, attested by three or more credible witnesses." Mrs. Leber executed a deed of the property to Watkins, one of the trustees, which was not signed, sealed and attested as required by the deed of settlement. BURKS, J., in delivering the opinion of the court, said: "I do not perceive on what ground it can be maintained that the execution of the deed to Watkins was such a disposition of the property as is authorized by the deed of settlement. The writing contemplated is a writing under the hand and seal of the *cestui que trust*, attested by at least three credible witnesses, directing the trustee to convey or transfer the property as may be appointed. The deed executed has none of the requisites, except that it is a writing under the hand and seal of the *cestui que trust*. It does not in terms direct a conveyance or transfer of the property, is not addressed to the trustees with that view, and is not attested. * * * In marriage settlements the object generally is two-fold,—to protect the wife against the control and influence of her husband, and also against her own weakness and incapacity,—and I am not disposed, by construction and the active assistance of the court, to break down the safeguards which she has deliberately thrown around herself and her property." And he concludes by saying that, in his opinion, Watkins "acquired no estate, right, title or interest, legal or equitable," under the deed.

In *Montgomery v. Agricultural Bank*, 10 S. & M. 566, the property of the wife was secured to her separate use by ante nuptial settlement, which gave to her power to sell, dispose of, or devise it, by will or other written instrument, signed by her, and attested by two witnesses, in her presence. After marriage, the trustee and husband and wife joined in a mort-

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gage to secure the husband's debt, and the mortgage was acknowledged, but not attested by two witnesses, as required by the settlement. The court held the mortgage void as to the wife's interest, and, among other things, said: "The form of disposal required by the settlement is by an instrument in writing, signed by the wife, and attested by two witnesses, in her presence, and by her request. Upon this subject it is sufficient to add to what has already been said in the case of *Minerva Doty et al. v. William S. Mitchell*, that the wife derives her power to dispose of the property, not from the law or statute, but from the settlement. Although under the statute an acknowledgment of a conveyance is equivalent to the attestation and proof by two witnesses, and even by one witness, by the decision of this court such is not the law governing the disposal of the separate property of a *feme covert*. She derives her power from the exception she herself makes by the settlement, and she must pursue the mode she has appointed for the exercise of the power."

In *Hopkins v. Myall*, 2 R. & M. 86, (6 Eng. Chancery, 409,) upon the marriage of Mr. and Mrs. Myall, certain property of the wife was assigned to trustees, upon trust for the wife, during her life, for her separate use, with remainder as the wife should appoint by any writing under her hand, attested by two witnesses; and for default of appointment, then, after the death of the wife, to the children of the marriage. The trustees, upon application of the husband and wife, made by letter signed by both of them, but not attested, parted with the trust fund to the husband. The wife died without having made any other appointment of the fund. Bill was filed by the children to compel the trustees to replace the fund. The Master of the Rolls, SIR JOHN LEACH, said: "The ceremonies required by the settlement were introduced for the express purpose of protecting the wife against the influence of the husband, and are matters of substance, and not of form; and without an adherence to those ceremonies, the interest

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of the children could not be defeated." Like ruling, in principle, will be found in *Maut v. Leith*, 15 Beav. 524; *Cocker v. Quayle*, 1 R. & M. 535, (5 Eng. Chancery, 535); *Ladd v. Ladd*, 8 How. (U. S.) 10; *Doty v. Mitchell*, 9 S. & M. 435; *Whiting v. Rust*, 1 Gratt. 483; *Burdett v. Spillsbury*, 6 M. & G. 386, (46 Eng. Com. Law, 385.)

The point, however, is made, that our Married Woman's act of 1861 confers upon married women power to own and control property as if sole, and therefore, Mrs. Yeaton might exercise her power of appointment without regard to the restrictions and limitations in the settlement. This, we think, is entirely a misapprehension. That act affects only the separate estates of married women derived in the mode provided in the act. It has nothing whatever to do with the exercise of *powers* by her. We are unable to perceive why the restrictions here, if the power had even been given to be exercised by a *feme sole*, would not have been binding. As owner, Mrs. Yeaton, before marriage, might place such restrictions not forbidden by or contrary to the policy of the law, upon the future alienation or disposition of her property as she saw fit; and it can not be pretended that these restrictions are, in any degree, forbidden by or contrary to the policy of the law.

Under our law, prior to the act of 1861, a married woman could not alienate her real estate, except by strictly pursuing the mode prescribed by statute—the right being purely statutory. (*Moulton et ux. v. Hurd*, 20 Ill. 137.) And since the passage of that act, and prior to the amendment of 1874, a married woman could not convey her separate estate, acquired pursuant to the provisions of that act, unless her husband joined in the deed of conveyance. *Cookson v. Toole*, 59 Ill. 521; *Bressler v. Kent*, 61 id. 426; *Elder v. Jones*, 85 id. 384; *Brooks v. Kearns*, 86 id. 547. Nor would a court of equity, however clear the proof, reform such a deed by correcting a mistake in the certificate of the acknowledgment thereof,—

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and this, because, as was said in *Lindley v. Smith et al.* 58 Ill. 250, "conveyances by married women for the transfer of their real estate or dower interest, do not take effect by delivery, as other deeds, but only by being acknowledged in the statutory mode," and that "an acknowledgment not in the mode prescribed must render the deed useless as a conveyance of title." See *Moulton et ux. v. Hurd*, *Lindley v. Smith*, *supra*; *Hutchings v. Huggins*, 59 Ill. 29; *Board of Trustees v. Darison*, 65 id. 124; *Rogers v. Higgins et al.* 48 id. 211. And inasmuch as it was only by enabling laws that a married woman could convey her real property, and the statute made it imperative that, to do so, she must join with her husband, a deed of conveyance by her, to him, was absolutely void. *Brooks v. Kearns*, *supra*.

So it results, necessarily, the deed by Cowdery and Mrs. Yeaton to Yeaton, treated as an attempted conveyance of her property, was absolutely void. Treated as an execution of the power of appointment, it was void because not attested by three or more credible witnesses, as required by the articles of settlement.

But it is again argued by counsel for plaintiffs in error, at most this was but a defective execution of a power, and it will be aided by a court of equity. In our opinion, this is not such a case as a court of equity will lend its aid in remedy of a defective execution of a power.

It is said in 2 Sugden on Powers, (3d Am. from 7th Lond. ed.) p. 84, *94, sec. 13: "But it has been decided that a defective execution of a power by a wife can not be aided in favor of her husband; nor can a disposition by a married woman, in conjunction with her husband, without the solemnities required by the power, although the trustees of the fund act upon it, be supported on the ground of the intention and the power to do the act; for the ceremonies in such a case are introduced for the express purpose of protecting the wife against the husband, and are matters of substance, and not

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of form." This is sustained by *Hopkins v. Myall*, 2 R. & M. 86, referred to *supra*.

Again, the same authority, at p. 87, *98, says: "The characters of purchaser, wife, creditor, child, must be borne by the party claiming relief in relation to the donee of the power, and not to the person creating it." And again, on p. 89, sec. 26, it is said: "Where a man makes even a voluntary settlement, vesting the property in a trustee, and ties himself down to a specified mode of revoking it, equity will not presume that he intended to revoke the settlement by the acceptance of a conveyance to himself not expressing any such intention; and if there is any neglect of the solemnities required, yet equity will not supply the want of them, for the settler is entitled to no aid, but if he desire to regain the property, he must pursue his power." And *a fortiori* must he do so when he seeks to obtain his wife's property through her appointment under a power.

In *Justis v. English*, *supra*, it was contended that the deed made and acknowledged by Mrs. Leber was merely a defective execution of a power, which a court of equity would aid, but the court held otherwise, saying, page 574: "Aid is extended where the defect is in matters of form, never where it is in matters of substance. In the case before us, the instrument is not only inappropriate, and the execution of it not according to the form prescribed in that it is not attested by the requisite number of witnesses, but it is not attested at all. This is more than a mere informality. Attestation in some form, at least, or to some extent, would seem to be requisite. I regard it as essential to the due execution of the power in cases like the one before us. * * * By the instrument creating her separate estate, Mrs. Leber chose to restrain, limit and regulate her power of disposing of that estate. Equity, deviating from the rule of the common law, accords her this right. The restraint imposed was a modification of her estate. She thought proper to make the

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presence of witnesses,—at least three credible witnesses,—necessary to attest the disposition of her property, and for a court of equity to give effect to an alleged disposition, and that to her own trustee, made in the absence of any witness, would seem more like creating a power than aiding in the execution of one.”

In *Thockwell v. Gardiner*, 5 DeG. & S. 58, the marriage settlement provided for settlements of the intended wife's personal property (being a bond for £1500) to her separate use for life, and then to her children, and giving her power to appoint the same by instrument attested by two credible witnesses. She wrote a letter to some bankers with whom her husband did business, and whom he owed, agreeing they might hold the bond as collateral, for advances they had made her husband, or which they might thereafter make to him. The letter was not attested. The bankers afterwards made advances to the husband on the faith of the letter. The court held that the letter was a good pledge of her life estate in the bond, but not being attested by two witnesses, was not a valid appointment of the remainder, under the power, and it was said: “There is no doubt that this court will aid the defective execution of a power in favor of a creditor or purchaser, and that it will do so though the donee of the power be a married woman; but the court, in such cases, must be satisfied that the formalities which have not been observed are no more than matters of form, and that the donee has not, by their non-observance, been deprived of any of the protection which a due exercise of the power would have afforded her; and the court looks with especial jealousy on a transaction in which the wife may have acted under the influence of her husband. The case of *Hopkins v. Myall* illustrated the principles of the court in this respect. In the present case the plaintiffs have proved nothing beyond Mrs. Gardiner's signature to the letter. * * * It thus appears that Mrs. G.'s signature was obtained by her husband for his own purpose,

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without that protection against his influence which the power contemplated."

But the question still occurs, whether the power of appointment, here, was not in fact properly exercised, or, rather, under all the facts appearing, is it not to be presumed that it was so exercised?

There is no evidence whatever that Mrs. Yeaton, "by any writing or writings under her hand and seal, attested by three or more credible witnesses, or by her last will and testament in writing, by her signed, sealed, published and declared in the presence of the like number of witnesses," directed, limited or appointed the assignment, transfer or payment of the bank stock, or its proceeds, or the conveyance of the real estate in which its proceeds were invested, and which is now here in controversy, to Yeaton, or to any one else. It simply appears that on the 6th of November, 1868, Mary Frances Yeaton, wife of William C. Yeaton, and George W. Cowdery, surviving trustee, by an instrument in writing of that date, purport, in consideration of \$5, at the written request of Mary Frances, to convey the property in controversy to William C. Yeaton. It is not recited that the written request is attested by any witnesses, and the purported conveyance is unattested by witnesses, and the certificate of acknowledgment fails to show that Mrs. Yeaton was, by the officer taking the acknowledgment, made acquainted with the contents of the instrument, and examined, separate and apart from her husband, as to whether she executed the same freely and voluntarily, and without any compulsion of her husband, as required by the statute then in force in this State; nor is there any proof that such certificate of acknowledgment was, under the laws of Virginia, where the acknowledgment was taken, sufficient to pass the title of the wife, or to bind and conclude her by the instrument. A party claiming title must show a compliance with every condition precedent to the vesting of the title. The request in writing, attested by

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three or more credible witnesses, is here made, by the articles of settlement, a condition precedent to the vesting of title. The evidence might probably have been preserved by recitals in the deed of the trustee, or by the retention of the original instrument in writing; but however it should have been preserved, it was incumbent on those claiming under the deed of the trustee to show that it had been executed. It was that, and that alone, which gave the trustee authority to act. The principle is sanctioned by *Williams v. Peyton*, 4 Wheat. 79.

The point is made, and urged with much force, that the evidence fails to show that the proceeds of the bank stocks, which were the subject of the articles of settlement, went into this property. The deed of the 16th of November, 1864, recited, that by direction of Mary Frances a portion of the proceeds of the sale of the stocks had been invested in the real estate in controversy, and purports to be executed in consideration thereof. Some criticism is indulged on the form of expression, that Mrs. Yeaton had directed a portion of the proceeds of the sale *to be* invested, instead of reciting that the investment *had been* made. We think, taking the whole recital together, it is, in effect, an acknowledgment that the investment had been made. The conveyance was intended to vest the title. It was made, obviously, because the investment of the proceeds of the sale of the stocks had been made, for a mere direction to invest, without investing, could form no consideration, and be no inducement to convey. The language is carelessly used, but the meaning is, in our opinion, manifest enough. These admissions are, at least, *prima facie* evidence, against those claiming under Yeaton, of the truth of the facts admitted, and on considering the entire evidence relating to the question, we are not prepared to hold that it is insufficient to prove that proceeds of the sale of the stocks were invested in this property, but we think the reverse is sufficiently proven.

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Another point made is, that on the 16th of November, 1864, the property belonged to William C. Yeaton, and he had the power to attach what trusts he chose, and by the terms of his deed then made he subjected it to the power of sale and substitution declared by the decree of the Alexandria circuit court. If this property was not otherwise chargeable with a trust, this position would doubtless be true; but if the property had been purchased by Yeaton, in the first instance, with trust funds, or if the consideration of his sale and conveyance was trust funds, he could by no declaration of his change the terms of the trust with which the funds invested in the land were originally charged. No doctrine is better settled than that the *cestui que trust* may pursue the proceeds of trust property, and charge with the original trust any property in which they may be invested, as against all who have actual or presumptive notice of the trust. Story's Eq. Jur. sec. 1255 *et seq.*; Perry on Trusts, sec. 217; *Alwood v. Mansfield*, 59 Ill. 507.

Since the evidence here shows that the stocks which were charged with a trust were sold, and their proceeds invested in this property, it follows the *cestuis que trust* may lawfully assert their claim,—not because of the trust declared by Yeaton's deed, but because of the trust with which the stocks were charged. Although the recitals in the deed are competent evidence of the facts recited against its maker and those claiming under him, the deed does not, by being used as evidence for this purpose, become binding and conclusive upon the defendants in error for all purposes. What the grantor admits by the deed, is one thing; what he, in consequence of the fact, admitted, or from other motives intended to effect by the deed, is another and entirely different thing. The admission, as against him and those claiming under him, but as against nobody else, proves the fact admitted. But the grant, and the declaration of the purpose of the grant, are no part of the admission, and although binding on

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him and those claiming under him, is not binding on the grantee, where, as here, the admission shows the property is, because the consideration paid for it is charged with a trust, liable to be charged with the same trust, at the election of the *cestui que trust*. The right of the *cestui que trust* is to follow the trust property into whatever it may be converted, and, without regard to the form of the conveyance, establish and fasten upon it the original trust. There can be, as we conceive, no stronger reason for saying a trust can not be thus established where the grantor has expressly declared a different trust, than where he has made an absolute deed, for in both cases, and in the one precisely as in the other, it is the circumstances outside of, and independent of, the deed, and of which the deed itself may or may not furnish evidence, that establish the trust, and not the declarations of the grantor. Undoubtedly, where the *cestuis que trust* are in a condition to act for themselves, they may accept deeds in consideration for trust property or its proceeds, with new and different trusts, or without any trusts declared; but there is no cause for pretending this can have any application here.

Again, it is insisted that by the laws of Virginia, where Mrs. Yeaton was domiciled, she had power to dispose of the stocks (they being personal property) without reference to the clause in the articles of settlement requiring her to manifest her action in writing, attested by three witnesses, and *Justis v. English, supra*, is cited to sustain the position. It is enough to say that case only refers to "her separate personal property." These stocks, before her marriage, were disposed of by the articles of marriage settlement, so that she only retained the right to dispose of them, during the life of her husband, by exercising a power of appointment in the mode prescribed. After her marriage, and during coverture, they were not "her separate personal property," within the sense in which that language is used in *Justis v. English*.

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It is said the present purchasers do not claim under the deed of 1864, and, striking out that deed, they have a perfect title,—they claim under Yeaton, who was seized before 1864, and who, upon the partition in 1869, was allotted his share in severalty. But upon what ground shall the deed of 1864 be stricken out? That deed was on record, and those who subsequently purchased this property, purchased with notice of its contents. It referred to the articles of marriage settlement, and showed that a portion of the proceeds of the sales of the stocks went into this property. It was ample for the purpose of putting subsequent purchasers upon their guard. By attending to its language they would have been led to a knowledge of the trust with which the property was charged, and this is sufficient as to all who claim under subsequent conveyances from Yeaton. *Justis v. English*, *supra*; *Oliver v. Piatt*, 3 How. (U. S.) 165; *Duncan v. Jandon*, 15 Wall. 165; *Railroad Co. v. Durant*, (5 Otto,) 95 U. S. 576.

So, also, the deed of 1868 carried notice of its imperfection upon its face, to all. Its record was notice that it was executed for but a nominal consideration,—that it was, in effect, a gift from the wife to the husband. It did not profess to be pursuant to the terms of a decree of a court of competent jurisdiction, nor purport to have been upon the written request of the wife, attested by three witnesses, nor even to have been acknowledged in conformity with the laws of this State.

The question is asked, "Why, if there was a trust declared by William C. Yeaton, in 1864, in an undivided one-half of the premises here in question, which was not divested, the whole of the premises should now be made to bear the burden?" The trust followed the title in Yeaton and his grantees. The partition gave no new title,—it simply changed its character from that of a tenant in common to an owner in severalty. (*Smith v. Crawford*, 81 Ill. 299.)

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But it was optional only whether the *cestuis que trust* should pursue the proceeds of the sale of the bank stock, and treat the property now in controversy as held in trust for them upon the original trusts,—that is, the trust did not absolutely, and at all events, attach; there was simply the right in the *cestuis que trust* to have it attach, and, consequently, they might repudiate the trust and disclaim any title to the property, and proceed upon any other remedies to which they were entitled, either *in rem* or *in personam*. 2 Story's Equity Jur. sec. 1262. *Murray et al. v. Winter et al.* 2 Johns. Ch. 441.

The policy of our law is in favor of the free alienation of real property, and against tying it up, or otherwise fettering its alienation, for an unreasonable length of time; and therefore, in cases of optional rights to defeat or divest titles, or to charge property with trusts, the party entitled to the option must, when aware of his right, exercise it promptly, and not, by delay and inattention, give reason for the belief that he has abandoned it. J. Southgate Yeaton was born August 17, 1850, and was, consequently, twenty-one years of age on the 17th of August, 1871. The present bill was not filed until the 19th of March, 1879, and he admits that he became aware of the facts in regard to this property at least as early as 1872,—some seven years, or nearly so, before the filing of the bill. He says: "I have known, ever since I was a child, that my father was interested in Chicago property. Somewhere between 1869 and 1872 I first knew of the means by which my father acquired his title to such real estate. I have known that my father was borrowing money on said real estate ever since 1872, or about that time." His only excuse for his long delay in asserting his rights is, that about January, 1873, he consulted with what he regarded as a competent lawyer in regard to the title, and his opinion being that it was perfect in his father, he rested contented until about the time of the filing the bill, when he was awakened to a sense of his rights by the opinion of another

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lawyer to a different effect. This amounts to no more than saying he was ignorant of the law, which can not avail. All, or the principal part, of the plaintiffs in error acquired their rights in this property since J. Southgate Yeaton had notice of his rights, and the proof also shows that he actively encouraged the agent of his father, subsequent to that time, to alienate and incumber the property. We think his *laches* has been such as now to preclude his right to any portion of this property. *Hamilton v. Lubukee et al.* 51 Ill. 415; *Bush v. Sherman*, 80 id. 160; *Williams v. Rhodes*, 81 id. 571; *Munn et al. v. Burges et al.* 70 id. 604; *Cox v. Montgomery*, 36 id. 396; *Winchell v. Edwards*, 57 id. 45; *Beach v. Shaw*, id. 17; *Burr v. Borden et al.* 61 id. 389; *Dempster v. West*, 69 id. 613.

As to the other defendants in error, the evidence shows that they were ignorant of the facts affecting their rights until shortly before the filing of the bill. They are not, therefore, chargeable with *laches*. Perry on Trusts, sec. 230.

An objection is urged against the form of the action, and it is insisted partition is not appropriate for the relief sought. The statute authorizes courts of equity to adjust all conflicting titles in such cases. (See *Henrichsen v. Hodgen*, 67 Ill. 179, and *Harrer v. Wallner*, 80 id. 197.) The suit was in equity, and plaintiffs in error had ample opportunity to interpose all their defences.

A final objection to be noticed is, that the decree should have directed the improvements to be paid for, without qualification. The decree directs that "the defendants, (or such of them as have made improvements upon any part of said premises, under the belief that they were the owners thereof,) or the grantees of such persons, are entitled to be paid the amount of the enhanced value of such premises, less the reasonable value of the use and occupation of such premises, exclusive of such improvements, during the time the same have been occupied by them," etc. We perceive no objection

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to this. Certainly, improvements which have not enhanced the value of the premises should not be paid for. It is only equitable that there should be compensation in proportion to benefits. .

The decree of the court below, as respects the interest claimed by J. Southgate Yeaton, is reversed, and the cause remanded for further proceedings consistent with this opinion, but in all other respects it is affirmed.

Decree reversed in part and in part affirmed.

Subsequently, on an application for a rehearing, the following additional opinion was filed :

PER CURIAM: After careful consideration of the petition for rehearing, we feel compelled to deny its prayer. We have, however, availed ourselves of the opportunity thus afforded to correct an error which we had inadvertently committed in the opinion, in answer to one of the points of the plaintiffs in error; but this in nowise affects the result.

We do not regard the variance between the allegations in the bill and the proofs as material. Whether, when Yeaton purchased the property, he purchased with the trust funds, or whether he purchased it with other funds, but sold and conveyed it to Cowdery for the trust funds, can make no difference to the *cestuis que trust*. In either case their right to assert a claim to the property is because the trust funds were invested in the property; and, as we have attempted to show in the opinion, Yeaton, although he might have refused to sell for trust funds (the property not being charged with a trust before), having once done so, could, by no declaration in the deed, cut off or modify the right of the *cestuis que trust* to follow the trust fund into what it was converted, and have this property charged with the same trust; and certainly he could not do so if he originally bought the property with the trust funds. Inasmuch as Yeaton took the legal title to himself, without any express declaration of trust, the fee was

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in law in him, and was conveyed by the deed to Cowdery, as is alleged; but whether the consideration for that conveyance was money invested by him in its purchase, or money received as the consideration for its sale by him, we conceive at present makes no difference, since the same right to follow the money into the land, and charge the land with the same trust to which the money is subject, exists in the one case that exists in the other.

The prayer for rehearing is denied.

Rehearing denied.

T. E. ELLSWORTH

v.

A. E. HARMON.

Filed at Springfield June 20, 1881—Rehearing denied January Term, 1882.

1. GUARANTY—when guarantor is liable. A party guarantied the payment of a promissory note and coupons before their delivery, the note running for five years, with interest payable semi-annually, but containing a clause that if default should be made in the payment of principal or interest, or any part thereof, for the space of ten days, then, on the election of the holder, the whole note and all arrears of interest should become due, and the whole was declared due for default in the payment of interest, and the guarantor, who was also trustee in a deed of trust given to secure the note, was authorized to sell the mortgaged premises for the full amount of the debt, which he did, but struck the property off to the creditor without any authority to do so; the creditor refused to accept the deed made by the trustee, and assigned the note to the plaintiff, who brought suit in his own name upon the guaranty: *Held*, that the plaintiff was entitled to recover.

2. TRUSTEE'S SALE—sale to one without authority, is void. Where the creditor in a deed of trust directs the trustee to sell for the entire debt due, but sends no bid or authorizes any to be made for him, a bid by the trustee in the creditor's name is without authority, and the making of a deed for the property to the creditor, and recording the same, will not affect his rights if he does not accept the deed, and no title will pass.

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WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

This was an action of assumpsit, brought by T. E. Ellsworth, against A. E. Harmon, in the Champaign circuit court, to the March term, A. D. 1880, upon his guaranty of a promissory note. The note was executed by John Bauer, on January 1, 1877, and made payable to Lucy M. Shoemaker, in the sum of \$2000, five years after its date, with interest at ten per cent, payable semi-annually, evidenced by coupons; and it provided that if default should be made in the payment of principal or interest, or any part thereof, for the space of ten days, then, on the election of the holder of the note, the whole of the principal and arrears of interest should become due. This note was secured by a trust deed, in which Harmon, the defendant, was trustee. The defendant, before the delivery of the note, guarantied its payment by an indorsement on the same, as follows:

"For value received, I hereby guarantee the payment of the within note, and coupons thereto attached, to Lucy M. Shoemaker, her heirs and assigns, and agree to collect the same free of charge to her or to them.

Feb. 12, 1877.

A. E. HARMON."

About the 8th of July, 1878, the defendant wrote to the plaintiff, who was then acting as the agent of the payee in the note, that Bauer had made default in the payment of interest. The plaintiff, in reply, wrote to the defendant that the legal holder of the note elected to declare the principal and arrears of interest due, and authorized him to sell the property for the full amount thereof. The defendant thereupon advertised, and sold the property on August 19, 1878. The trustee bid for Mrs. Shoemaker the amount due on the

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note and coupons, and costs of sale, and struck the same off to her, and made a deed to her, which he had recorded and then transmitted to her. This deed was some time afterwards returned to the defendant, and notice given that the holder of the note relied on his guaranty, and did not wish to invest in lands. The proof further showed that the defendant assured the plaintiff that he would be able to make a sale of the property in a short time, and realize the money.

Mrs. Shoemaker having indorsed the note to the plaintiff, he brought this suit upon the guaranty, and a trial was had before the court, without a jury. The court found the issues for the defendant, and rendered judgment accordingly, which judgment was affirmed by the Appellate Court, and the case is brought here by writ of error.

The Appellate Court found the facts substantially as stated above, and that said note and coupons were secured by a deed of trust; that upon the election of the payee to declare the whole debt due for default in the payment of the interest, the payee requested the defendant, as trustee, to proceed at once and foreclose the deed of trust; that thereupon he advertised and sold the property in the trust deed, but that, in making such sale, the defendant, without any direction or authority from the payee, who was then the legal holder of said notes and coupons, struck the same off to her for the full amount of the debt, with the accrued interest thereon, and the costs of the sale, and made out, and signed, sealed, acknowledged and delivered to the payee, a deed conveying the property in the trust deed to her, and after having the same recorded, transmitted it to the plaintiff, who was then the agent of the payee, and that said deed was not accepted by the payee, but after being retained by the plaintiff, pending certain correspondence relative thereto, until October 3, 1878, the plaintiff returned said deed to the defendant. The court further found, that afterwards the payee assigned the note and coupons to the plaintiff, and that the payee had never

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reconveyed or tendered a reconveyance of the premises to the defendant, other than the return of the deed.

Mr. E. L. SWEET, for the plaintiff in error.

Mr. J. S. WOLFE, for the defendant in error.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

The only question here presented is, whether the plaintiff can maintain this action, on the facts as found by the Appellate Court. No reason is perceived why plaintiff below should not have judgment against the guarantor for the amount due upon the note. By the terms of the note it is shown to be due. By the previous rulings of this court the assignment of this note carried with it the guaranty, and vested in the assignee of the note a right to sue upon the guaranty, in his own name. The bidding by the trustee in the name of the creditor, at the sale, was without authority. The deed made by the trustee to the creditor was not accepted, and the making and recording thereof, by the trustee, did not affect the rights of the creditor,—no title passed by the deed. If the defendant, or any one else, needs that cloud upon the title removed, a court of chancery can afford relief. The creditor, however, can not be delayed in the collection of the debt by reason of such embarrassment.

The judgment of the Appellate Court is reversed, and the cause remanded for further proceedings in accord with this opinion.

Judgment reversed.

Syllabus.

JOHN B. WEIDENGER

v.

HARMON SPRUANCE.

Filed at Ottawa March 18, 1881.

1. STOCKHOLDERS—*changing the conditions as to liability for debts of corporation, by subsequent legislation—under constitution of 1848.* Section 2, art. 10, of the constitution of 1848, which provides that “dues from corporations not possessing banking powers or privileges, shall be secured by such individual liability of stockholders of the corporation, or other means, as may be prescribed by law,” was designed to express the reservation of power in the General Assembly in granting charters, to provide, from time to time, by legislation, as experience should suggest or wisdom dictate, for the securing of dues from corporations, by individual liability of the corporators, or other means.

2. The language of the section does not seem necessarily to require that this should be done in the charters, and be made a condition precedent to the exercise of corporate powers, but rather to cast upon the legislature the supervising duty of ascertaining what legislation shall be necessary to attain the desired end, and then to provide it; so that every stockholder in a corporation of a character not within the exception named, organized under that constitution, took his stock subject to this supervisory power of the General Assembly, and to be affected by whatever legislation in that regard the General Assembly might deem necessary.

3. The 16th section of the general Insurance law of 1869 provides, that “the trustees and corporators shall be severally liable for all debts or responsibilities of such company, to the amount by him or her subscribed, *until the whole amount* of the capital of such company shall have been paid in.” The Commercial Insurance Company was organized under a special charter granted in 1865, which did not prescribe as a condition to the liability of the individual stockholders that the *entire capital* of the company should be paid in, nor did the charter, as considered for the purposes of the decision, contain any reservation to the General Assembly of power to amend it. Nevertheless, that provision of the act of 1869 was given effect as against the corporators or stockholders of the company for liabilities of the corporation accruing after the act went into effect,—and this, by virtue of the reservation of power to the General Assembly, in the constitution, to supervise, in that regard, the affairs of preëxisting corporations.

4. In giving such effect to the act it was not regarded as an impairment of the obligation of the contract between the prior stockholders and the corporation, or the creditors of the corporation. The act simply required preëxist-

101	278
130	292
101	278
142	308
146	58
101	278
178	307

101	278
199	637

101	278
207	1860

Statement of the case.

ing corporations to cease to carry on their business unless they should comply with its provisions, and the liability imposed upon the stockholder is by way of penalty, only, for disobedience to this mandate.

5. But the application of the act in respect to the stockholders of the Commercial Insurance Company is sustainable upon another ground. The charter of the company authorized the directory to call in such an installment on stock subscribed as they might deem necessary,—not less than twenty per cent in cash,—and the balance to be secured in a prescribed manner. Even if there was an implied authority, in the absence of any express grant of power to that effect, for the company to commence or prosecute business before the payment so authorized to be required, was made, still such implied authority but amounted to a license, subject to be revoked, except so far as acted upon, at any time, by the General Assembly.

6. But the real obligation of the contract of each subscriber was, that he should pay for his stock. A mere expectation on his part that the law would not be enforced in requiring all the capital stock to be paid in, was not a vested right. It became the duty of the corporation to have payment made into its treasury of its capital stock, and if the stockholders failed to exercise their controlling authority in requiring that duty to be performed, it was competent for the General Assembly to impose a reasonable penalty, such as that prescribed in the act of 1869, for the non-performance of that duty, although the duty may have been declared, and its performance enjoined, by the principles of the common law or the provisions of a prior statute.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of debt, brought by Joseph B. Weidenger, for the use of T. B. Elliott, against Harmon Spruance, as a stockholder in the Commercial Insurance Company, upon the individual liability of the defendant for a debt of the company to the amount of his stock, the capital stock of the company never having been paid in. The court overruled demurrers to pleas of the defendant, and gave judgment against the plaintiff for costs. This judgment was affirmed in the Appellate Court.

Brief for the Plaintiff in Error.

Messrs. SHUFELDT & WESTOVER, for the plaintiff in error:

1. The Commercial Insurance Company was organized under the public act of the General Assembly of Illinois, approved February 10, 1865. The constitution of 1848, then in force, contained this clause: "Dues from corporations not possessing banking powers or privileges, shall be secured by such individual liabilities of the corporators, or other means, as may be prescribed by law." (Const. of 1848, art. 10.) The Commercial Insurance Company received its charter, subject to such conditions as might be imposed by law, under that constitutional provision. *Massachusetts General Hospital v. State Mutual Life Assurance Co.* 4 Gray, 227; *Suydam v. Moore*, 8 Barb. 358; *Story v. Jersey City, etc. Plank Road Co.* 1 Green, (16 N. J. Eq.) 13; *Attorney General v. Railroad Co.* 35 Wis. 435.

2. The constitution being virtually a reservation of the right to amend the charter of the corporations organized under it, as to liability of corporators, section 16 of the general law of 1869 became, by the terms of the law, a part of the charter of all such companies. *Tomlinson v. Jessup*, 15 Wall. 454; *Miller v. The State*, id. 478; *Suydam v. Moore*, 8 Barb. 358; *McLaren v. Pennington*, 1 Paige Ch. 102; *Roxbury v. Providence and Boston R. R. Co.* 6 Cush. 424; *Pennsylvania College Cases*, 13 Wall. 190; *People v. Manhattan Co.* 9 Wend. 351; *Schenectady and Saratoga Plank Road Co. v. Thatcher*, 11 N. Y. 102.

3. The legislature thus amended the charter of this company, and by the amendment every stockholder or corporator became bound as to his individual liability. *In re Reciprocity Bank*, 22 N. Y. 9; *Sherman v. Smith*, 1 Black, 587; *In re Oliver Lee's Bank*, 21 N. Y. 9; *Stanley v. Stanley*, 26 Maine, 191; *Baily v. Hollister*, 12 N. Y. 112.

4. The capital stock of the company not being paid in, the defendant, a corporator in said company, became liable

Brief for the Defendant in Error.

to the plaintiff, individually, for the amount of the debt of the corporation to the plaintiff, not to exceed an amount equal to defendant's stock. *Culver v. Third National Bank*, 64 Ill. 529; *Butler v. Walker*, 80 id. 345.

Messrs. BOUTELL & WATERMAN, for the defendant in error:

Article 10 of the constitution of 1848 was not self-acting, in the sense of imposing upon the stockholders of corporations thereafter created, an individual liability. Legislation was needed to make it active or effective. *Hill v. City of Chicago*, 60 Ill. 86.

The charter of the company became and was a contract. It did not impose upon the stockholders any liability for the dues of the company. It exempted them from liability, and no legislature could thereafter, without the consent of this company, change its charter so as to impose a personal liability upon its stockholders. *Washington Bridge Co. v. State*, 18 Conn. 65; *Wheeler v. Frontier Bank*, 23 Me. 308; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 44; *People v. Platt*, 17 Johns. 215; *Dartmouth College v. Woodward*, 4 Wheat. 518; Angell & Ames on Corp. secs. 4, 595.

The charter of the Commercial Insurance Company not containing any reservation to the legislature of a right to change it in any way, and not being subject to any such constitutional provision, the act of 1869 could not operate to impose upon defendant a liability which he was not before under. *Wheeler v. Frontier Bank*, 23 Maine, 308; *Ireland v. Palestine Co.* 19 Ohio St. 369.

The statute does not apply to such a case as the present:

First—Because companies theretofore organized are by section 19 especially excepted from the operation of the act. (Sec. 16, chap. 73, Rev. Stat.)

Second—Because section 16 applies only to the original corporators and trustees of companies organized under the

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act. (Secs. 1, 3, 10, 16, 19, chap. 73, Rev. Stat.) Defendant was neither a corporator nor trustee.

Third—Because the Commercial Insurance Company was not organized under the act. The statute makes liable only trustees and corporators of companies organized under the act.

Fourth—Because the provision imposing personal liability is to be strictly construed. *Gray v. Coffin et al.* 9 Cush. 192.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court :

The present case differs from *Gulliver v. Rælle*, 100 Ill. 141, in this: In that case the right to amend was expressly reserved in the charter; in the present case such right was reserved in an amendment to the charter, which the pleas aver was never accepted by the company, and so it must be taken for the present that no right of amendment was reserved in the charter; and the question therefore is, treating the 16th section of the general law as an amendment of this charter, does it impair the obligation of a contract? We are of opinion the answer should be in the negative.

By sec. 2 of art. 10 of the constitution of 1848 it is provided, that "dues from corporations not possessing banking powers or privileges, shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law." This, it is to be observed, is not the expression of a *grant* of power, for the General Assembly without this, under its general legislative powers, might, in creating such corporations, provide any mode for securing the payment of debts to be contracted by them, deemed advisable. It is not the expression of a prohibition upon the creation of such corporations unless certain prescribed provisions shall be inserted in the charters, for the mode of securing the dues is left to be determined by the General Assembly; and it could not, therefore, be said that any exercise of that discretion, whatever it might be, is unconstitutional. We

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can not suppose that in making an instrument of the importance and dignity of a constitution, a mere idle lecture to the General Assembly would be inserted; and so, to give effect to the language, it would seem we might well conclude it was designed to express the reservation of power in the General Assembly in granting charters, to provide, from time to time, as experience should suggest or wisdom dictate, for the securing of dues from the corporations, "by individual liability of the corporators, or other means." The language employed does not seem to necessarily require that this shall be done in the charter, and be made a condition precedent to the exercise of corporate powers, but rather to cast upon the General Assembly the supervising duty of ascertaining what legislation shall be actually necessary to attain the desired end, and then to provide it. If this be conceded, then every stockholder takes his stock subject to this supervision of the General Assembly, and to be affected by whatever legislation in that regard the General Assembly may deem necessary; and so we have held in *Arenz v. Weir*, 89 Ill. 25.

But we shall not rest our decision purely on this ground. The 2d section of the charter of the Commercial Insurance Company provides for a capital stock of \$200,000, divided into shares of \$100 each; and its 3d section authorizes the board of directors to call in such an installment on the stock subscribed as they may deem necessary,—not less than twenty per cent in cash,—and for the balance of such subscription they may take bonds, secured by mortgages on unincumbered real estate in the State of Illinois, or judgment notes of responsible parties. (Private Laws of 1865, vol. 1, p. 632.)

No authority is expressly given by the charter to commence or prosecute business before the twenty per cent in cash is paid in, and the balance is paid in bonds or judgment notes, secured in the manner provided. But if it may be said that such authority is implied, this implied authority can but

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amount to a license, subject to be revoked, except so far as acted upon, whenever the General Assembly may so declare. It can not be said the obligation of the contract of the shareholder with the corporation, or with creditors of the corporation, or with the other stockholders, is, that the corporation shall proceed with its business when the capital stock is unpaid. On the contrary, the obligation of the contract of each subscriber is, that he shall pay for his stock, for this is his undertaking; and every creditor has a vested right that this shall be done, for he has become a creditor upon the faith of it. Every stockholder, moreover, has a vested interest in the contract of subscription of every other stockholder, for each subscription is a part of a complete whole, and the failure in the payment of one leaves the burdens to be borne by all, proportionally, that much greater. See *Chandler v. Brown*, 77 Ill. 333.

A mere expectation of property in the future is not a vested right. (Cooley's Const. Limitations, 359; *Richardson v. Aiken*, 87 Ill. 138.) And, upon like principle, a mere expectation that the law will not be enforced in requiring all the capital stock of a corporation to be paid in, can not be a vested right, nor can there be a vested right to do business upon a credit, without affording adequate security for the payment of the debts to be contracted. See *Richardson v. Aiken*, *supra*.

Whether we shall regard the rights of the corporation, treating it as a legal entity separate and distinct from the stockholders, or the rights of the stockholders as individuals, this must be so. The stockholders derive all their rights, as such, through and by virtue of the charter of the corporation, and they have only the right to demand that shall be done which the corporation may, under its charter, legally claim the right to do. The corporation owes the duty of having payment made into its treasury of its capital stock, but it can only be coerced into the performance of that duty by a power acting upon the *persons* who control and put in action

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its corporate functions. The mere intangible entity constituting the *legal person*, disconnected from the *natural persons*, through whose agency effect is given to its powers, can not be coerced, for the simple reason there is nothing there upon which coercive power can take effect. It is competent for the General Assembly to impose a reasonable penalty for the non-performance of a legal duty, although the duty may have been declared, and its performance enjoined, by the principles of the common law or the provisions of a prior statute. *Chicago, Rock Island and Pacific R. R. Co. v. Reedy*, 66 Ill. 43; *Chicago and St. Louis R. R. Co. v. Warrington*, 92 id. 157; *Barnett v. Atlantic and Pacific R. R. Co.* 68 Mo. 56.

The 16th section of the general Insurance law of 1869 (Rev. Stat. 1874, p. 595,) provides, that "the trustees and corporators shall be severally liable for all debts or responsibilities of such company, to the amount by him or her subscribed, until the whole amount of the capital of such company shall have been paid in," as thereinbefore provided. The object of this was, unmistakably, to compel such companies, before proceeding further, to have their entire capital paid in. By the 10th section of the same act, such companies are not authorized to commence business, in the first instance, until this is done. It is, in effect, therefore, saying to old companies whose capital is not all paid in: "Proceed no further! Stop right here until all your capital stock is paid in; and if you shall disregard this mandate, your trustees and corporators shall be liable for all debts or responsibilities you shall hereafter create." This is but the imposition of a penalty. *Richardson v. Aiken*, *supra*; *First National Bank of Maryland v. Price et al.* 33 Md. 487; *Cameron v. Seaman*, 69 N. Y. 396; *Derrickson v. Smith*, 27 N. J. L. 166; *Steam Engine Co. v. Hubbard*, 101 U. S. 188.

The stockholders elect the directors, and, through them, carry into effect the corporate functions. Presumably, the directors act in obedience to the aggregate wishes of the

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stockholders, and this, through by-laws and the aid of courts of equity in proper cases, may be made practically so. The board of directors can not proceed unlawfully in the exercise of the corporate franchise, without being liable to restraint by a court of equity, at the instance of a stockholder. *Coleman v. Eastern Counties Ry. Co.* 10 Beav. 1; *Bliss v. Anderson*, 31 Ala. (N. S.) 612.

As is said in Angell & Ames on Corp. (5th ed.) sec. 312, p. 363: "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation; and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy."

The case does not present the question of the competency of the General Assembly to increase the liability of the stockholder upon his contract of subscription, but the question is, merely, can the General Assembly, as to corporations already in being, forbid them doing business in the future until all their capital stock is paid in, and impose a penalty upon those by whom the corporate powers and functions are controlled and exercised, if they shall disobey this mandate? The liability upon the stockholder is not because he made a contract, which he has performed, to take and pay for so much stock, but because he, as a member of the corporation, and, therefore, a responsible agent in controlling and causing to be executed the corporate powers and functions, has allowed to be done, or failed to prevent the doing of, that which the law prohibited. As a punishment for the wrong he is responsible for, he is made liable to those injured thereby to the extent of his interest in the corporation, and of his agency presumed therefrom in causing or permitting the injury. The courts in Massachusetts and Maine have, as we conceive, gone farther than this, and hold that statutes imposing a personal liability on stockholders for the future

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debts of corporations are free of constitutional objection. *Gray v. Coffin et al.* 9 Cush. 192; *Stanley v. Stanley*, 26 Maine, 191; *Coffin et al. v. Rich*, 45 id. 507.

In *Gray v. Coffin*, SHAW, Ch. J. said: "This act was general in its nature, extended to members of all corporations, providing to what extent they should be liable to the claims of creditors and all persons dealing with and becoming creditors of any corporation. It was future and prospective in its operation, regulating the rights of debtor and creditor, as they should arise, expressly securing any right acquired by any person against a holder of stock in any corporation, by force of existing laws. It had no tendency to impair, or in any way affect or modify, any power, privilege or immunity pertaining to the franchise of any corporation, and therefore seems to be within the just limits of legislative power." This view is indorsed by the author in *Thompson on Liability of Stockholders*, sec. 65. See, also, secs. 66, 67, 68.

In *Ireland v. Palestine Co.* 19 Ohio St. 369, a contrary ruling obtained, and it was there held that such a law impaired the obligations of the contract between the stockholder and the corporation.

It is unnecessary that we should, at this time, express any preference as between these rulings. We refer to them merely as showing the tendency of the judicial mind on a kindred question to that here involved, and to distinguish the present case from the cases in which they obtained.

We repeat, the liability here imposed upon the stockholder is by way of penalty, only. He is not, in the first instance, nor at all events, liable for the future debts of the corporation. And so, it is believed, there is nothing, even in the Ohio case, in conflict with our ruling here. Our conclusion is, no constitutional right is impaired by imposing this liability.

The decree will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

Mr. Chief Justice DICKEY, dissenting.

Mr. CHIEF JUSTICE DICKEY* dissenting:

In the case of *Gulliver v. Rælle*, 100 Ill. 141, I endeavored to show that the word "corporators," in the 16th section of the act of March 11, 1869, was not used in that place in a sense synonymous with the word "stockholders," but was intended in that section to designate the original organizers or promoters of a corporation to be formed under that act, whose duties and powers were set forth in the preceding sections. I also endeavored to show, that even if we assume that the word "corporators," as used in section 16, was intended to mean all stockholders, still it was not intended by section 19 of that act to make section 16 applicable to then existing corporations, working under special charters.

In that case I also expressed the opinion, that as to existing stockholders in companies then doing business under special charters (even where the power of amendment of such charters was reserved to the legislature), the General Assembly did not possess the power to impose such new burden upon such stockholders without their consent and without their fault.

This latter proposition I did not then discuss, or attempt to support by authority. I now propose to give some reasons for the views I hold on this question, as applicable to the case at bar. In that case power to amend the charter was reserved to the General Assembly. In this, there is no reservation of that kind.

The decision in this case of this latter question is placed upon two grounds: First, an attempt is made to draw power from certain words in the constitution of 1848; and, secondly, the exercise of the power is defended upon a supposed or presumed agency resting in the hands of the officers of the corporation to commit offences, for which the stockholder, as principal, may be punished for the sin of his agents. I

* At the time of filing this opinion Mr. Justice DICKEY was Chief Justice.

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will consider the latter proposition first, and then examine the source of power supposed to lurk in the language of the constitution of 1848.

When the State, by the act of 1865, adopted by its General Assembly, enacted that the persons named in that act, "and such *other persons* as might become stockholders," should be, and were by the act, declared to be "a body corporate and politic," with the powers and privileges mentioned in the act, and as soon as such corporation was duly organized, and the defendant in error became a stockholder under that charter, and his stock was fully paid, the defendant in error was clothed by the act with certain rights which he did not before have, and for which he had paid a valuable consideration. Those rights he held by purchase, and through a grant from the State of Illinois. His title to those rights was as sacred, and as thoroughly beyond the power of the General Assembly to take away or destroy, as is the right of any citizen to his private property. What were those rights? At common law the defendant in error had the right to associate with the other persons constituting this corporation, in a firm or partnership, and jointly to do an insurance business. In such case he would have rendered himself liable, as a partner, for any, all and every obligation of the association, and unless there had been a provision to the contrary in the articles of partnership, he would have been bound to give his personal attention to the business.

By the act of incorporation under which defendant in error became a stockholder, he acquired the right, upon paying in full for his stock, of being free from personal liability for the debts of the association, and the right to be free from any duty to give to the business his personal attention; and he also acquired the right to have a limitation on the power of his associates to bind him by their action. Without the act of incorporation he would have been liable, to the whole extent of his estate, for every contract made by any one of the asso-

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ciates in behalf of the association. Under the act he had a grant of the right of sharing as a stockholder in the profits of the business, without any one or more having an agency to affect by their action any part of his estate, except that part which he had placed in their hands by becoming a stockholder,—that is, his interest in the corporate property as the owner of his shares. Beyond this interest in the corporate property no part of his estate could, under the act, be controlled or incumbered by any one. He then held three rights granted by the State: First, the right to be a corporator, without being personally liable for the debts of the company; second, the right to be a stockholder, without giving to any one the power to charge any part of his estate, other than his interest in the corporate property, with any debt of the association; and, third, the right to be a stockholder, without any obligation on him to give his personal attention to the business of the association.

The grant, and the acceptance of the grant, in my judgment, made, by necessary implication, a valid, binding contract between the State and the defendant in error as such stockholder, by which the State undertook, in consideration that he would pay his money for his shares, that no further or other burdens should be imposed upon him, merely because he had, on the invitation of the State, become, and continued to be, such stockholder. If defendant in error held those rights by contract, the State could not impair the obligation of that contract, by imposing new burdens upon him, without violating the constitution of the United States. If it can not be said that the circumstances made a contract binding upon the State, it surely can not be denied that defendant in error held such rights by grant from the State, and hence had a title to them as sacred as any other private property, which the ablest jurists declare to be such that they can not be taken away by the mere fiat of a legislature. To support this position I will refer hereafter to some authorities.

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The question in this case is thus squarely presented, whether as to a stockholder holding such rights under a charter, in reference to which no power of amendment was reserved to the legislature, either by the charter or by any statute then in force, the General Assembly had the power, on March 11, 1869, by its mere fiat, to change or violate such rights by imposing upon him, without his consent, the new duty or burden of causing all other stockholders to pay in full for their shares, or of watching the officers of the company constantly, and preventing them, by suits in equity at his own cost, from incurring any further debts or responsibilities until the capital should be all paid in, and a certificate thereof should be duly filed and recorded, and the power to impose upon him a penalty for no other offence than that he had become a stockholder in this company on the invitation of the General Assembly, and had simply continued to be such stockholder.

I am clearly of opinion that the General Assembly was clothed with no such power. To maintain this position it is not necessary that I should question the power claimed for the General Assembly to say, by that act, to then existing companies, "Stop right here! Do no more business until your capital shall all be paid in, and a certificate thereof shall be recorded." It may be a legitimate exercise of the police power to compel companies to so conduct their business as not to expose the public to unreasonable risk of loss, nor need I here question the power of the legislature to enforce such a mandate by penalties imposed upon each of such corporations which should fail to obey the mandate, and for which the property and the franchises of the company might be taken, nor need I deny the power to punish, by personal liability as penalties, any and all persons (whether connected with the corporation or not) who should thereafter aid, abet or encourage the officers of such corporation in a violation of such mandate; and to thus punish the officers of the cor-

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poration for failing to prevent the violation of such mandate, where their duty, voluntarily assumed, required them to supervise vigilantly the doings of the corporation. But it does not follow that penalties can be lawfully imposed upon the mere stockholder. He has no duty, as such, resting upon him (either by common law or by statutes in force when he assumed that position) requiring him to give his personal attention to the management of the business of the corporation. The directors chosen by the holders of the majority of the stock have no power to do any act by which that part of this stockholder's estate not invested in this company can be affected, and neither the legislature, nor any one else except this stockholder, can enlarge the power of attorney under which the directors act. It is error, therefore, to say that as to this new duty and new burden the officers of the company act, presumably, by the authority of the stockholder, so as to make their acts his, in any respect whatever, except in so far as the property of the corporation may be affected by the acts of such officers. By becoming a stockholder, defendant in error has agreed that, in so far as concerns the property of the corporation, he is to be bound by their acts, but *no farther*.

The decision of the Supreme Court of Ohio is directly in point in support of my views upon this question, in *Ireland v. Palestine Turnpike Co.* 19 Ohio St. 369. In that case the company was organized in January, 1852, under an act passed in 1849. Ireland was one of the subscribers to the stock, and had paid in full his subscription. The law under which he became a stockholder (as in this case) imposed no individual responsibility upon the stockholders beyond the payment of the amount of their subscriptions. By acts passed after Ireland became a stockholder, it was provided that turnpike companies might issue bonds for certain purposes, and that the stockholders of all companies which should issue such bonds should be liable individually, to the

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amount of their stock, for the payment of bonds so issued, and that stockholders in such cases might, if a majority of them should so determine, be assessed upon their stock, and compelled to pay to the company, *pro rata* of the indebtedness, an amount not exceeding the amount of their stock. Ireland refused to pay an assessment made upon him in pursuance of these statutes, and a judgment was given against him for the amount of his assessment. That judgment was brought before the Supreme Court for review, and was there reversed. That court held that the statute, in so far as it authorized assessments against stockholders who had paid their subscriptions, and who, by the laws in force when they became stockholders, were not liable individually for the debts of the company, was *unconstitutional*. It was there said of such a statute: "It impairs the validity of the contract between the company and the stockholder. In a contract between the company and a stockholder, or in an action by the former or by its creditors, the stockholder is to be regarded as an individual person, separate and distinct from the corporation. He becomes a stockholder by virtue of a contract with the company, and he has a right to stand upon the *terms of that contract*, interpreted and limited by *the laws* under which it was made. By his contract with the company, Ireland agreed to pay a specified sum, and no more. This sum he has paid, and to require him to contribute an additional amount would be to violate the contract." It is added: "The stockholder may waive his constitutional right, and become liable by his *own act or consent*. * * * The burden of showing such consent or acquiescence rests with the party seeking to hold him liable, or estop him from denying his liability. Nor was this a matter as to which the directors, or even a majority of the stockholders, were authorized by law to act for him. The power of a corporation over the rights of a stockholder, whether exercised by the directors or a majority of the stockholders, is limited to his rights in

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the corporate property, and does not extend to his private and individual property. As to the latter, the stockholder gives the company no authority whatever beyond the amount of his subscription, and no *subsequent* legislative grant of such power will be valid without his assent. This distinction between the private rights and the corporate rights of the stockholders should never be lost sight of, and its application will go far to reconcile many of the authorities which appear to be conflicting. * * * By becoming a member, the stockholder places a specified amount of his private property in the common fund, and subjects it to the control of the company, * * * but he grants no power whatever over the remainder of his private property, which is wholly unaffected thereby. As to the latter, the company has no more authority than it has over the property or rights of a stranger."

Chief Justice SHAW, in *Stedman v. Eveleth*, 6 Metc. 121, speaking of the extent of the powers of officers of a corporation as agents of the respective stockholders, said, very emphatically: "They are not agents of the stockholders in their *personal capacity*."

In the case at bar, therefore, although each stockholder is an individual part of the corporation, it can not properly be said, for that reason alone, that he is to be regarded as a party to and an actor conjointly with the directors, in permitting and causing that to be done which the law forbids, except in so far as concerns his interest in the property of the corporation. Thus far he is liable to be affected by the action of the company; thus far the majority of the stockholders, or the officers, may be regarded as his agents; but as Chief Justice SHAW has well said, the officers of the corporation "are not agents of the stockholder in his *personal capacity*." It is a personal liability with which Spruance is here charged. In that regard neither the officers of the company, nor a majority of the stockholders, nor the legislature,

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nor any or all of them combined, can, under our institutions, charge him by contract or tort, or in any other mode, with a personal liability, without his personal consent and without his personal fault.

It is said in support of the conclusion reached in the case at bar: "The stockholder is not made liable because he has made a contract which he has performed, * * * but because, as a responsible *agent* in the controlling and executing the corporate powers and functions, he has done that which the law prohibited. As a punishment for the wrong he is responsible for, he is made liable to the extent of *his agency*, presumed therefrom, in causing the wrong." There is nothing in this record tending to show that Spruance ever acted, or had power to act, as the agent of this corporation. It seems to me it is not enough to concede that the contract of the stockholder does not subject him to this new and additional burden; but in addition to that, his contract, by *necessary* implication, was, that no additional burden should be imposed upon him merely because of his being a stockholder, and this contract is violated by the imposition of a new burden. And, aside from this protection by the necessary implication of his contract, we have seen that he is not the agent of the corporation, for he can not bind the corporation by any bargain he may make or by any act he can do, nor is the corporation, or all its officers, his agents "in his personal capacity." There is no "presumed" agency arising from his relation as stockholder beyond what affects his interest in the corporate property. The acts of the directors outside that sphere are not his acts,—their guilt is not his guilt. The legislature has no power, by mere fiat, to change innocence into guilt, and punish it as such. It was no crime to be a stockholder when Spruance became a stockholder. The legislature can not, by a subsequent statute, make it penal to be, or to continue to be, a stockholder. It can not, by legislation, make innocence guilt.

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In support of this general view of the limited powers of every legislature, under a constitution where the legislative powers alone are conferred upon one department, and in support of the protection to the rights to private property, and the sanctity of contracts against encroachment by State statutes, afforded under our political institutions, I bring the solemn declarations of Marshall, Kent, Story, Shaw, and other great jurists.

The sanctity of the right of the subject or citizen to his own private property, and the inviolability of private contracts, have been recognized and vindicated by the jurists of all civilized communities, and his right to hold his private property free from confiscation (whether directly or indirectly) by mere legislative fiat, has, in one form or other, been held sacred in all countries where powers legislative, executive and judicial have been each committed to a separate class of officers. All American courts have in some mode or other refused to give effect to statutes whose words seem to warrant violation of such rights. Jurists have not been entirely in harmony as to the mode of reasoning on which they have heretofore refused to render such judgments. Some (asserting the power of a legislature to pass such laws where they are not forbidden by any constitution) avoid such result by pronouncing the same so monstrous that they will not hold that the legislature intended, by the language of the statute, to produce such result. Other jurists avoid such result by holding that the constitutional inhibitions against the passing of any *ex post facto* law, or any law impairing the obligation of contracts, and against the passing of bills of attainder, prohibit expressly such result. Others (conceiving that such rights of the citizen are not within the protection of these express limitations found in the written constitutions) hold that statutes doing violence to such private rights are void, because they are not within the scope of legislative authority. The constitution of 1848, by which

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"the legislative authority of this State" was "vested in" the General Assembly, contains a clause which seems to exclude the power of passing such laws from the general grant of "legislative authority," in which clause it is declared that "all men have certain inherent and *indefeasible* rights, among which are those of acquiring, possessing and protecting property." If such rights be *indefeasible*, they surely can not be abrogated, impaired, or made void, by the exercise of any *legislative* authority, for such authority does not embrace power to invade, in the slightest degree, an indefeasible right of the private citizen. Thus it will be seen that in that constitution the truth was recognized that many individual rights are not derived from the constitution.

Mr. Webster said: "Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." Cooley says: "In considering State constitutions we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed." (Cooley's Const. Lim. 37.) He quotes in this connection, with approbation, the happy language of Judge BATES, used in argument, wherein he said of a constitution: "It is not the origin of private rights. * * * It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of rights * * * which they possessed before the constitution was made."

The right of the owner to his private property is of this character. It is a fundamental, "indefeasible" right in Illinois, and it can not be taken away lawfully, without his consent, given by him directly, or given by reasonable (if not *necessary*) implication, arising from some contract which he has made, unless it be by way of *penalty* for his *own wrong*, or for public

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use, upon just compensation. A statute passed by the General Assembly to deprive the owner, by mere enactment, of his right to his private property,—a right declared by that constitution to be “*indefeasible*,”—is therefore void, for want of constitutional authority to pass it.

In *Fletcher v. Peck*, 6 Cranch, 138, Chief Justice MARSHALL, delivering the opinion of the Supreme Court of the United States, said: “The constitution of the United States contains what may be deemed a bill of rights for the people of each State. No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. The legislature is then prohibited from passing a law by which a man’s estate, or any part of it, shall be seized for a crime, which was not declared by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds that estate?”

In that case, the legislature of Georgia, having granted a tract of land to one who conveyed it to another, passed a statute rescinding the act by which the land was granted. Speaking of this latter statute, MARSHALL says: “This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime *not committed by himself*, but by those from whom he purchased. This can not be effected in the form of an *ex post facto* law, or bill of attainder. Why, then, is it allowed in the form of a law annulling the original grant?”

In the case at bar, Spruance is punished, by a forfeiture of a part of his private estate, for an offence “not committed by himself, but by the corporation from whom he or his grantor

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purchased this stock." Chief Justice MARSHALL says, "this can not be effected in the form of an *ex post facto* law, or bill of attainder. Why, then, is it allowable in the form of a law annulling the original grant" to him of the right of being a stockholder of this corporation, holding full paid stock, without being liable for the debts of the corporation?

In *The Society, etc. v. Wheeler et al.* 2 Gallison, 139, Judge STORY declared, that "upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty in respect to transactions or considerations already passed, must be deemed retrospective." And he adds, that where such a statute affects vested rights and past transactions by "operating only from and after its passage," to hold such a statute not to be retroactive, and therefore valid, "would enable the legislature to accomplish that indirectly which it could not do directly."

Chief Justice PARKER, in *Medford v. Learnerd*, 16 Mass. 215, said: "No legislator could have entertained the opinion that a citizen free of debt *could be made a debtor* by a legislative act declaring him one."

The subject of the invalidity of a statute, in so far as it is made to operate in the future so as to injuriously affect a right vested before the passage of the act, is ably discussed by Chief Justice KENT in *Dash v. Van Kleet*, 7 Johns. 500, and its invalidity declared as resulting from the nature of our social compact.

Cooley on Constitutional Limitations, p. 19, refers to the constitutional provision against passing bills of attainder, as made to protect individual rights against possible abuse of State power, and on page 47, as to the powers of a State in making laws, even in its constitution, he says: "It must not assume to violate the obligation of any contract, or attain persons of crime;" and on page 319 he says this latter constitutional provision was "undoubtedly aimed at any and

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every species of legislative punishment for criminal or supposed criminal offences."

In *Terret et al. v. Taylor et al.* 9 Cranch, 50, Judge STORY declared, that "if the legislature possessed the authority to make a grant, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundation of the right of the citizen to the free enjoyment of his property legally acquired."

These declarations of fundamental principles are all in support of the teachings of the case of *Ireland v. Palestine Turnpike Co.*, *supra*, and accord with the view I take of the law, which ought, in my judgment, to govern in the case at bar.

It seems to be supposed that the courts of Massachusetts and of Maine have made decisions which are not in harmony with the views expressed in the Ohio case, referred to; and *Gray v. Coffin et al.* 9 Cush. 192; *Stanley v. Stanley*, 26 Maine, 191, and *Coffin v. Rich*, 45 id. 507, are cited as incompatible with the ruling in Ohio. This, I think, is an error. I find nothing in these cases which militates against my views, or those expressed by the Supreme Court of Ohio.

In the case of *Gray v. Coffin*, by the laws of that State in force when the corporation was organized, each stockholder was made liable for the debts of the corporation. Afterwards, in 1838, a statute was passed preserving the rights of all creditors of the corporation who had become so upon the faith of such personal liability of all the stockholders, and providing, as to all persons who should in future become creditors of the corporation, persons holding stock in trust as trustees, executors, etc., should not be personally liable for such debts of the corporation. After this law passed, the defendants in that case acquired shares of stock as assignees of insolvent owners of such stock. After this, and while this

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act of 1838 was in full force, the corporation became indebted to the plaintiff. The defendants claimed that they held this stock as trustees. The plaintiff contended that the act providing immunity to stockholders, holding as trustees, was in that respect unconstitutional. It was as to that question Ch. J. SHAW said the act was general, extending to members of all corporations, and providing *the extent* to which they should be liable to all persons dealing (thereafter) with the corporation, and that the act was future in its operation, regulating the rights of creditor and debtor as they should *thereafter* arise, *expressly* securing any right acquired by any person against the holder of stock in any corporation *by force of existing laws*, and, as it impaired in no way the franchise of the corporation, he added, the act "therefore seems within the limits of legislative power." This great jurist here recognizes the idea that legislative power has limits, and that if the act had impaired the franchise of the corporation, or had not secured the already acquired rights of creditors against stockholders, under laws in force when such rights against the stockholders accrued, the act would not have been within the limits of legislative power. That act was constitutional, because it did not invade the vested right of any creditor; this act is unconstitutional, because (as construed by this court) it did invade the vested right of the stockholder. Stockholders have rights as well as creditors. The same court, in *Commonwealth v. Cochituate Bank*, 3 Allen, 44, declared, that "the liabilities of the stockholders of" that bank "must be found in the statutes passed *previously* to its incorporation."

In the case of *Stanley v. Stanley*, 26 Maine, 191, the corporation was chartered in 1833, subject to a general law then in force, reserving power in the legislature to amend all charters. In 1839 an act was passed subjecting stockholders of all corporations created after 1831, to liability for all debts created by the corporation after 1839. The debt of the cor-

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poration was created after 1839, and the defendant *became a stockholder after that time*, and the court held him liable, because, by becoming a stockholder *after* the passage of the statute *imposing the liability*, he is regarded, "therefore, as *assenting thereto*." Holding a stockholder to a liability which he voluntarily assumed at the time when he became a stockholder, is one thing, and holding him liable to a new burden imposed by statute *after* he became a stockholder, and without his assent, is another and very different thing.

In the case of *Stanley v. Stanley*, *supra*, the corporation was organized when there was in force a general statute reserving, in all cases, to the legislature power to amend all charters, and by an act passed in 1839, stockholders in such corporations were made liable for debts of corporations, to the amount of their stock. After this law was passed the debt of the corporation was contracted, and the stockholder in the case became a stockholder after this. And the court said: "The debt was incurred after the act of 1839, and the plaintiff became a stockholder after that time. He may be regarded, therefore, as having become so with a full knowledge of the liability, and *therefore as assenting thereto*."

Coffin v. Rich, *supra*, was an action by a creditor of a corporation seeking to recover of a stockholder plaintiff's debt against the corporation. A statute in force at the time when the defendant became a stockholder imposed upon stockholders a personal liability for debts of the corporation, and the court said: "*When stockholders became members*, they knew the law held them personally responsible for the corporate debts." In that case, however, judgment was given for the stockholder, upon the ground that the statute imposing the liability was repealed after he became such stockholder, and he was thereby relieved from the liability.

I find nothing in these cases in conflict with the views presented in the Ohio case. There are some general words found in the opinions, which, when read by themselves, and

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without reference to the facts under discussion, seem to go farther than this; but this is the extent of their meaning when read in connection with the rest of the opinion, and in reference to the facts before the court. In fact, in an earlier case, which these cases in Maine do not profess to overrule, and with which (when read carefully and at large) they are in entire harmony, this same court expressed views necessarily in full support of the thoughts so well expressed by the Supreme Court of Ohio,—views founded upon the same constitutional principles. I refer to the case of *Wheeler v. Frontier Bank*, 23 Maine, 239. In that case the court, in commenting upon a statute of that State, the language of which was general, imposing personal liability upon stockholders, without expressly limiting the same to those who might thereafter become stockholders, had said (p. 310): "We can not think it requires the citation of authority, or an elaborate course of reasoning, to prove that the legislature *can not* have the power to create a liability of an individual for a debt for which he was not before liable, nor can they authorize an attachment of property of any one, and the disposition of it, to pay a debt which he had not before contracted to pay. After the passage of the act of 1836, those who became stockholders might well be considered as having become so with a view to, and an acquiescence in, the liability created by the act; but those who *previously* had become owners of stock, when no such liability had been provided for, would *certainly* have a right to complain if their stock could be taken from them to pay a debt for which they had not *before* been in any manner liable." When the opinions in *Stanley v. Stanley*, and in *Coffin v. Rich*, are read in the light of this clear declaration of the true limitations of legislative authority, their true meaning can not be misunderstood; and they do not at all conflict with the views of the Supreme Court of Ohio in *Ireland v. Palestine Turnpike Co. supra*.

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It may be that the legislatures of Massachusetts and Maine have gone further than ours in the imposition of personal liability upon those who should, in the future, become stockholders in some classes of corporations; but so far as I have been able to discover, their courts have in no case gone so far as to impose new burdens on stockholders by statutes passed after they became such stockholders, where there was no power to do so reserved in laws in force at the time when such stockholders acquired their stock.

The position is, however, taken, that authority in the legislature to impose new liabilities upon a stockholder, by statutes passed after he has become a stockholder (upon the faith of a charter protecting him from such burdens), is to be found in the words of the constitution of 1848, wherein it is said: "Dues from corporations not possessing banking powers or privileges, shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law."

It is said this "is not the expression of a grant of power," that it is not "the expression of a prohibition" upon the exercise of legislative discretion as to the terms of charters to be granted, and that it is not "a mere idle lecture to the General Assembly;" and "so, to give effect to the language," it follows that this language was "designed to express the *reservation* of power in the General Assembly in granting charters, to provide, from time to time," for the securing of dues from corporations "by individual liability of the corporators, or other means." I agree that this clause is neither a grant of power, nor a limitation of power, nor a mere idle lecture to the General Assembly; but I can not accede to the postulate implied in the proposition, that if neither, it must be deemed a *reservation* of authority or power. It *may*, it seems to me, be an imperative mandate upon the General Assembly, which, by the obligation of the oath of each member to "support the constitution," each member in the General Assembly is bound, in the discharge of his official duty, to

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regard and obey. This is the view of that clause expressed by this court in the late case of *Gulliver v. Rælle et al.*

Again, it can not be a reservation of power in the legislature to rescind a grant of a property right given by the legislature, and accepted and paid for by the grantee, or to violate the obligations of a contract, or to take the private property of one and give it to another; for we have shown, upon the highest authority, that power to do these things does not lurk within general words vesting in the General Assembly the legislative powers of the State, because such a power is not legislative, in the true sense. * It is impossible to reserve to the legislature a power it does not possess. Nothing, in the nature of things, can be reserved which is not possessed. It is well said, that without this clause the General Assembly, "under its general legislative powers, might, in *creating* corporations, provide any mode deemed advisable for securing the payment of debts *to be contracted* by them." It might well have been added, under its general legislative powers the General Assembly could not thereby impose any personal and new liability upon a stockholder, at any time after he had become a stockholder, under law not imposing upon him such liability. *That* is the power involved here. If not derived from the general grant of legislative authority, but derived from this clause, it follows that this clause must be a grant of power not embraced in the general grant of legislative powers. The opinion says it is not the expression of a grant of power, while the judgment in this case gives to it the effect of a grant of extra power.

It is said, "the language employed" (in this clause of the constitution) "does not require that this" (the making provision for securing such dues of corporations) "*shall* be done in the charters, and made a condition precedent to the exercise of corporate powers,"—in other words, the exercise of this power *after* the subscription to the stock is not expressly prohibited. This may be true. It is equally true that it is

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not expressly provided that the power *may* be exercised after the rights of the stockholder shall have become fixed by his contract, under the law. It seems to me, therefore, that (it being conceded that the clause is not a grant of a new power) the reasonable conclusion is, the General Assembly was thereby commanded to secure the payment of the dues from corporations by the exercise of "the legislative authority" vested in it by the general grant thereof, found in section 1, article 3, of the same constitution; and we have the highest authority, as we have seen, for saying that under that *general* grant such liability could not be imposed after the rights and liabilities of the stockholder became fixed. The only individual liabilities required to be used for securing dues from corporations are "such as may be prescribed by law." If, in the absence of this clause, the General Assembly had no power to prescribe by law new burdens for the stockholder, except such as might be imposed *before* his rights and liabilities became fixed, then the requirement is by these words expressly limited to liabilities to be fixed *prior* to the contract of the stockholders.

To me the words of this section of the constitution of 1848 seem simple and plain. They seem to me to constitute, simply, the declaration of a duty imposed by the constitution upon the General Assembly to pass such laws as, in the judgment of the General Assembly, might be wise, to secure dues from corporations, and this was to be done by the imposition upon the corporators of such personal liabilities as should be prescribed by law, or by such other means as might be prescribed by law. The mandate did not impose upon the legislature the duty of imposing upon corporators any liability whatever. The security was to be provided in that way, or by some "other means" to be prescribed by law. There is nothing in these plain and simple words suggestive of a power to be exercised which had been denounced in the highest courts of the land as violations of our social compact,

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destructive of indefeasible rights, and as not embraced in a general grant of legislative powers. Had it been even suspected that under these plain words lay hidden the power now claimed to arise from them, can any man suppose that capitalists from abroad could ever have been induced to become stockholders in any of the corporations by which the grand network of railroads has been constructed, which now bear off the products of every part of the State? Let it be remembered, that if this construction of that clause be the true one, every holder of a single share in every one of these corporations, successful or unsuccessful, by becoming such a stockholder put himself in the power of the General Assembly, and made himself liable to be made (by a mere statute to be thereafter passed) to pay, to the extent of his entire estate, the millions of debt incurred by the corporation, with no mode of escape which occurs to my mind. Few men would have exposed their entire fortunes voluntarily to such danger of unfriendly legislation. Fortunately for this country they did not *then* understand the full force of these seemingly harmless words in that constitution.

I am fully persuaded that the conclusion reached by the court in this case is not that indicated by the law of the land, and it seems to me that the principles upon which it is placed, if carried to their logical results, must disturb rights which have ever been thought well protected under our constitution and institutions.

Mr. JUSTICE SHELDON also dissents.

Syllabus. Brief for the Plaintiff in Error.

THE PEOPLE *ex rel.* John Longress

v.

THE BOARD OF EDUCATION OF THE CITY OF QUINCY.

Filed at Springfield January 16, 1882.

1. QUO WARRANTO—*when the proper remedy—where board of education undertakes to exercise powers it does not possess.* Under our statute an information in the nature of a *quo warranto* lies against a board of education when it undertakes to exercise any powers not conferred by law, and in such proceeding the legality of any rule adopted by the board for the admission of pupils in the public schools may be tested.

2. SCHOOLS—*colored pupils—discrimination against them as to what schools they may attend.* The board of education of the city of Quincy divided the city into eight school districts, and by proper rules provided that no pupil should enter a school out of the district in which he or she resided, without permission of the superintendent, etc. The board also adopted a rule that no pupil of African descent should be permitted to attend any of the public schools of the city other than those designated for their use, and that all the colored pupils in the city should attend a certain public school in said city called the Lincoln school, and no other: *Held*, that the board, under the constitution and laws of the State, had no authority to adopt and enforce the rule in relation to colored pupils.

3. Under the laws of Illinois, aside from the fourteenth amendment of the constitution of the United States, directors of schools and boards of education have no discretion to deny a pupil of the proper age admission to the public schools on account of nationality, color or religion. They all stand equal under the law, and no discrimination in that regard can be made.

WRIT OF ERROR to the Circuit Court of Adams county; the
HON. JOHN H. WILLIAMS, Judge, presiding.

MESSRS. JOHN M. & JOHN MAYO PALMER, for the plaintiff in error, contended that under our statute an information would lie in a case like this. *Prima facie* the rules and regulations complained of are contrary to the policy of the State, are unreasonable, and are inconsistent with the laws. That the board of education have no power to make class distinctions on account of race or color, counsel cited *Chase v. Stephenson*, 71 Ill. 385.

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Brief for the Defendants in Error.

Messrs. WHEAT & MARCY, for the defendants in error:

The question presented is, whether the case will authorize a judgment in *quo warranto*. At common law the office of this proceeding was two-fold, viz: first, to oust the corporation from an usurped franchise; and second, to punish the corporation or its members, by fine or dissolution, for the misuse of its lawful franchise. High on Extraordinary Remedies, secs. 679, 680.

But even for this purpose the proceeding must be against the officers or corporators, and not against the corporation itself. *Chicago v. People*, 80 Ill. 496.

That the information does not lie against a public officer or municipal corporation for a particular illegal act, see *People v. Whitcomb*, 55 Ill. 172; High on Extraordinary Remedies, secs. 618 (and note 6), 636, 686, 690 (and note 1); *State v. Lyons*, 31 Iowa, 432; *State v. Chahaba*, 30 Ala. 66; *Cleaver v. Commonwealth*, 34 Pa. St. 283.

The statute (Hurd's Stat. 1880, p. 800,) does not extend the remedy to cases like the present, because the phrase, "powers not conferred by law," occurring in section 1, refers to usurped franchises, not powers to do particular acts. This is the construction given to the precisely similar statute of Indiana. *State v. Kilbrick T. Co.* 38 Ind. 71.

The statute was never intended to apply to public corporations, the judgment authorized by section 6 being inapplicable to such corporations. *Chicago v. People*, 80 Ill. 511.

The information in the nature of a *quo warranto*, under our statute, is in effect a criminal prosecution. The judgment imposes punishment by fine or ouster, or both, and hence the present proceeding is entirely misdirected. If a penalty for misconduct is to be inflicted, it should fall upon the members of the board, and not upon the corporation. *Donelly v. People*, 11 Ill. 552; *People v. M. and A. R. R. Co.* 13 id. 66; *Wight v. People*, 15 id. 417; *Lavalle v. People*, 68 id. 252; *Attorney General v. Barstow*, 4 Wis. 803.

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Again, it is settled that this proceeding does not lie to avoid the legislative action of a municipal body. High on Extraordinary Remedies, 689; *State v. Lyons*, 31 Iowa, 432.

Again, this remedy lies only when there is no other remedy. High on Extraordinary Remedies, 643, 645.

In this case *mandamus* lies. *Trustees v. People*, 87 Ill. 303.

Action lies for damages. *Rulison v. Post*, 79 Ill. 567.

Indictment lies. Rev. Stat. 1874, p. 983, secs. 100, 101.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was an information in the nature of a *quo warranto*, brought by the Attorney General, on the relation of John Longress, against the Board of Education of the City of Quincy, a corporation created by an act of the General Assembly, approved February 20, 1861. Private Laws of 1861, page 252. The board of education is entrusted by law with the exclusive management and control of the public schools in the city of Quincy.

It is alleged in the information, that the board of education did, on, to-wit, the 31st day of July, 1878, divide the city of Quincy into eight districts, suitable and convenient for the inhabitants of the city, and did establish and maintain in each of said districts an efficient and suitable public school, for the accommodation of all the *bona fide* residents of each of the districts between the ages of six and twenty-one years, and by proper rules providing that no pupil shall enter a school out of the district in which he or she resides, without permission of the superintendent, and that pupils, to be entitled to admission in any of the public schools, must be between the ages of six and twenty-one years, and *bona fide* residents of the city; and no pupil can be admitted into any public school without furnishing evidence to the principal that he or she has been vaccinated, or otherwise secured against the small-pox.

Opinion of the Court.

It is also averred in the information, that on the 31st day of July, 1878, before that time and since, there was a large number, to-wit, five hundred persons of African descent, commonly called "colored persons," between the ages of six and twenty-one years, who for all that time have been and are now *bona fide* residents of said city of Quincy, and in the several school districts thereof, and have been and are at all times, and are now, ready to furnish to the principal of the proper school satisfactory evidence that they have been vaccinated; and the said persons do now reside, and at all times heretofore have in good faith resided, in the different school districts of said city so established by the said The Board of Education of the City of Quincy, and are entitled to be admitted into the public schools of the districts in which they respectively reside, without being directly or indirectly excluded therefrom on account of their descent or color; yet the said The Board of Education of the City of Quincy, during all the time aforesaid, without warrant or authority of law, have adopted, maintained and enforced, for the management of the public schools of said city, and to exclude the said persons of African descent, commonly called "colored persons," from the said public schools in the districts in which they reside, on account of their descent and color, the following pretended rules and regulations for the government and management of the public schools of said city, that is to say: "That the colored schools of said city shall be composed of colored pupils who shall be of the prescribed age, and *bona fide* residents of said city; that no pupil of African descent shall be permitted to attend any of the public schools of the city other than the colored schools, and that all the colored pupils in said city shall attend a certain public school in said city, called the Lincoln school, and no other." All of which pretended rules and regulations for the government and management of said public schools in said city, the said The Board of Education of the said City of

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Quincy, without authority of law, do maintain and enforce, to the damage of the People of the State of Illinois, and again: the peace and dignity of the same.

The board of education filed five pleas to the information, to which the Attorney General interposed a demurrer, which the court carried back and sustained to the information, and this decision of the court is assigned for error.

Whether a proceeding in the nature of a *quo warranto*, instituted by the Attorney General, will lie in a case of this character at common law, is a question which it will not be necessary to determine. The object of the proceeding was to test the legality of the rules adopted by the board of education, and if the statute is broad enough to authorize the court to inquire into the action of the board in adopting and enforcing the rules which excluded children of color from the public schools, then the information was proper, and the court erred in sustaining the demurrer.

Sec. 1, chap. 112, Rev. Stat. 1874, p. 787, provides, "that in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, * * * or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law, * * * the Attorney General, or State's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof, in vacation, for leave to file an information in the nature of a *quo warranto*, * * * and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition," etc.

The board of education is a corporation created by law, clothed with the exercise of certain powers in relation to the public schools of Quincy. Now, if the board, in the discharge of its duties as a corporation, exercises powers not

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0 conferred by law, it is apparent that it will fall within the obvious meaning of the statute, unless the plain reading of the statute is to be disregarded. The very gist of the complaint here is, that the board of education, a corporation, is exercising powers not conferred by law, unless it had the right to adopt and enforce the rules set out in the information. We are therefore clearly of opinion that, under the statute, the Attorney General had the right to file the information.

This brings us to a consideration of the rules adopted and enforced by the board.

The board of education of the city of Quincy can exercise such powers, and only such, as are conferred upon it by the constitution and laws of the State. The inquiry then is, whether the rules adopted and enforced by the board, which exclude children of African descent from admission to the public schools which are provided for white children, are authorized by the laws of the State. It will not be necessary to determine what rights colored children had in our public schools prior to the adoption of our present constitution, as this case must be controlled by the terms of that instrument and the legislation which has followed since its adoption and ratification by the people.

Sec. 1, of art. 8, of the constitution of 1870, declares: "The General Assembly shall provide a thorough and efficient system of free schools, whereby *all* children of this State may receive a good common school education." In pursuance of this provision of the constitution, which makes no distinction in regard to the race or color of the children of the State who are entitled to share in the benefits to be derived from our public schools, the legislature, in 1872, passed an act to establish and maintain a system of free schools. (Laws of 1870, p. 700.) Sec. 48 of the act provides, that "the directors of each district shall be a body politic and corporate, under a certain name. They shall establish and keep in operation, for at least five months in

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each year, and longer if practicable, a sufficient number of free schools for the proper accommodation of all children in the district, and shall secure to all such children the right and opportunity to an equal education in such free schools." This section of the act was doubtless framed and adopted in view of the constitutional provision heretofore cited, and shows the clear intent of the legislature to make all children, regardless of race or color, between the ages of six and twenty-one years, beneficiaries, and entitled to the same rights and privileges in our free schools.

It may be that, under the terms of sec. 79 of the act, the section cited did not apply fully and in all respects to a city like Quincy, acting under a special act; but that fact we do not regard as material, in view of subsequent legislation on the same subject. In March, 1874, the legislature passed an act entitled "An act to protect colored children in their rights to attend public schools," the first section of which declares, "that all directors of schools, boards of education, or other school officers whose duty it now is or may be hereafter to provide, in their respective jurisdictions, schools for the education of all children between the ages of six and twenty-one years, are prohibited from excluding, directly or indirectly, any such child from such school on account of the color of such child." This section of the statute is so plain, and its terms are so clear, that its purport can not be misunderstood.

Under the amendment of the constitution of the United States, persons of color are citizens of the United States, and of the State where they may reside. Being citizens of the State, upon an equality with other citizens, there can be no doubt in regard to the power of the legislature to provide that no discrimination shall be made on account of color by boards of education who have the management and control of our free schools. Has the board of education disregarded and violated this section of the statute? The answer to this,

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in our judgment, can not admit of a reasonable doubt. It appears from the information, that the city of Quincy was divided into eight school districts,—that colored children reside in each of them. Under the rules adopted, these colored children are excluded from the public schools in the district where they reside, and are all required to attend a school composed exclusively of colored children, known as the Lincoln school. Under the operation of these rules a colored child can not attend the school in the district where such child resides, on account of its color, but is compelled to travel perhaps several miles to a distant part of the city to a colored school. This is a direct violation of the statute, which says the board is prohibited from excluding, directly or indirectly, any such child from such school on account of color. Under the rules, no reason is assigned which prohibits a colored child from attending the school in the district where it resides, except on account of its color.

In *Chase v. Stephenson*, 71 Ill. 383, where a similar question arose, the court said: "While the directors very properly have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position. The free schools of the State are public institutions, and in their management and control the law contemplates that they shall be so managed that all children within the district between the ages of six and twenty-one years, regardless of race or color, shall have equal and the same rights to participate in the benefits to be derived therefrom."

What was said in the case cited must be regarded as authority here.

Much of the argument on behalf of defendants in error has been directed to the point that the fourteenth amendment to the constitution of the United States has no application to the

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questions presented by this record. Whether the fourteenth amendment would prohibit school directors or boards of education from excluding colored children from the public schools by the adoption and enforcement of such rules as have been adopted in this case, is a question, which we do not deem it necessary to determine here. We base our decision on the constitution and laws of the State. The people of the State have the right to make such a constitution, and enact such laws under it, as they deem for the best interests of the public, and so long as our laws do not conflict with the constitution of the United States they must be held valid and binding upon the people of the State. Under our law, aside from the fourteenth amendment, directors of schools and boards of education, like defendants in error, have no discretion to deny a pupil of the proper age admission to the public schools on account of nationality, color or religion.

A like view of the same question was taken in *Clark v. Board of Directors*, 24 Iowa, 266, where it is said: "All the youth are equal before the law, and there is no discretion vested in the board of directors, or elsewhere, to interfere with or disturb that equality. The board of directors may exercise a uniform discretion, equally operative upon all, as to the residence, or qualifications, or freedom from contagious disease, or the like, of children, to entitle them to admission to each particular school; but the board can not, in their discretion or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing, or the like."

The case of *State v. McCann*, 21 Ohio St. 198, cited and relied upon, can have no bearing here, for the reason that boards of education in that State were authorized by statute to establish separate schools for colored children. *Roberts v. City of Boston*, 5 Cush. 198, relied upon by defendants in error, is distinguishable from this case. In Massachusetts,

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when the case was decided, there was no statute in the State prohibiting the school authorities from establishing colored schools and excluding colored pupils from the other schools. It is there said: "In the absence of special legislation on this subject, the law has vested the power in the committee to regulate the system of distribution and classification, and when this power is reasonably exercised, without being abused or perverted by colorable pretences, the decision of the committee must be deemed conclusive."

Ward v. Flood, 48 Cal. 36, and *Carey v. Carter*, 48 Ind. 327, were both cases where the statute of the respective States provided for the education of white and colored children in separate schools.

In *Hall v. DeCuir*, 5 Otto, 506, the question here presented was not before the court, and what was said by Mr. Justice CLIFFORD in a separate opinion, in relation to the bearing of the fourteenth amendment of the constitution on the questions here involved, can not be regarded as authority here.

Whether our constitution, and the acts of the legislature passed in pursuance of it which place all children, regardless of color, upon a perfect equality so far as admission into the public schools is concerned, are to be regarded as wise or unwise legislation, is a matter with which courts have no concern. We are bound to declare the law as we find it written, and if it is not satisfactory to any section of the State, the remedy is in the legislative department of the government, and there alone.

In conclusion, we are of opinion that the board of education of the city of Quincy had no authority to adopt and enforce the rules set out in the information, and the judgment will be reversed and the cause remanded.

Judgment reversed.

Mr. Justice WALKER, dissenting.

Mr. JUSTICE WALKER, dissenting:

I am unable to hold that the writ of *quo warranto* can be maintained on the facts disclosed by this record. The constitutionality of the law under which the board of education is acting, the election or qualification of its members, their power to divide the city into school districts, and to use all of the powers conferred by the law under which they are acting to maintain schools, or that they are performing that duty, are not questioned. But the complaint is, that the board has provided a school house, and by a rule of the board require all of the colored children of school age in the city to attend that school, thereby excluding them from the other city schools. There is no complaint that this building is not as commodious, as well furnished, and supplied with as competent teachers, as either of the other city schools.

It is urged that the rule which requires these children to attend this particular school is a usurpation of franchises and powers not granted by the charter, and for that reason the writ will lie, and is the proper remedy. It can not be successfully contended that this board do not have the power to separate the school children to some extent, or for some purposes. That the board may separate the sexes, if not prohibited by law, or may provide school houses for children of particular ages or a certain advancement in education, or divide the same school into different grades, and require each to occupy separate rooms, I presume none will question. This is clearly a power the board possesses, and they usurp no power in its exercise. Possessing the power to separate to some extent and for some purposes, a mere mistake in its exercise, or a misapplication of the powers, surely can not be held a usurpation that must work a forfeiture of the charter and a dissolution of the corporation. And on a conviction, can any one suggest any other judgment sanctioned by the law that can be rendered? I am aware of no other, nor has any been suggested.

Mr. Justice WALKER, dissenting.

To carry out one of the great and most cherished objects of our government,—the education of the youth of the State,—the general school system has been adopted, and the General Assembly, to further the same object, has granted this and a large number of other special charters. They, and the directors under the general law, are the instruments employed by the government to carry into effect this great purpose. This being true, can it be possible that districts under the general law, and under special charters, may be abolished by this writ because the directors or board of education may, as they all doubtless do, mistake their duties and powers? Is it possible that by this writ the whole system may be abolished, or greatly embarrassed, and its efficiency destroyed? Surely not. And yet, if the writ will lie in this case, I can perceive no reason why it will not lie in every case where the board of directors, or of education, mistake their duty. The purposes and the policy of the State can not be thus defeated, nor can we make arbitrary distinctions to prevent such results.

I hold that municipal bodies can not be dissolved by this writ, nor can corporations like this and other school districts be thus dissolved. They are the creatures of the government, and are under legislative control, and when they abuse their powers, or usurp authority, the General Assembly will afford the correction by a repeal or amendment of their charters, if deemed necessary. The courts will, by *mandamus* and injunction, compel an observance of duty, but should not, nor can they rightfully, dissolve such organizations. If it were held that this writ would lie for such a purpose, then, under our statute, counties, cities, villages and townships could be dissolved by adjudging a forfeiture of their franchises, and townships and counties left without local government, which is indispensable under our institutions. To my mind it is clear that no public corporation is amenable to this writ.

Mr. Justice WALKER, dissenting.

For what imaginable reason could the General Assembly have intended to confer power on the courts to dissolve a municipal body? Such organizations are created to serve the public, and are absolutely under the control of the General Assembly. If they or their officers abuse their power, the General Assembly may repeal their charter and terminate their existence, or impose penalties without a forfeiture being found and declared. Not so with private corporations, as they are not under legislative control, and their existence can only be terminated by surrender, or a forfeiture judicially declared. I therefore hold that the statute was not intended to, nor does it, confer such jurisdiction on the courts; but if it was, the creation, continuance and termination of municipal bodies is purely a legislative function. I can imagine nothing farther removed from judicial power than the creation or termination of a municipal corporation. The exercise of such a power by the court would be to encroach upon the legislative power of the government. The power is so purely legislative that its exercise can not, even by express enactment, be conferred on the judicial department without a violation of article 3 of the constitution, which distributes the powers of the government. Even if the statute can be construed as conferring power to declare a forfeiture of this charter, it would violate that article, as that power is vested in the legislature, and can not be delegated to either of the other branches.

The purpose of this writ is to correct public, and not private, wrongs. It is an extraordinary remedy, that can be employed only by consent of the court on application for the purpose, and is not a writ of right. It is used to oust usurpers into public offices, and to dissolve private corporate bodies which are usurping power that belongs to the government until legally granted to the body. It is a *quasi* criminal offence for a person to intrude into a public office to which he has not been legally elected or appointed, and so of indi-

Mr. Justice WALKER, dissenting.

viduals who usurp privileges and franchises which can only be rightfully exercised by virtue of a grant from government. Hence the government has a right to inquire and be informed by what right an individual is exercising governmental functions, or of persons exercising franchises, the source from which they are derived, and by what authority they are exercising them; and on conviction they are punished for exercising governmental powers by usurpation and wrong. If we hold the writ lies for every mistake by an officer or corporate body, for every official act of the one, or corporate act of the other, and it can thus be brought before the courts, and every mistake visited with a forfeiture, I think we would violate the statute, as this could not have been intended by the General Assembly.

If the officers of the board acted maliciously, and the children have been deprived of any right, the officers of the board are individually liable in case for the damages sustained. If they acted in good faith, in the belief that they were acting within the scope of their power, but were mistaken, and have deprived the children of any legal right, *mandamus* will correct the wrong and restore the right. For these reasons the writ does not lie. It only lies where there is no other remedy given by the law, but here there are two other remedies.

As I hold the writ does not lie, I refrain from expressing any opinion on other questions presented and urged in argument. I think the judgment of the court below should be affirmed.

Syllabus. Statement of the case.

BENJAMIN BERMAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield January 16, 1882.

1. **APPEAL**—*when it will lie.* Where, on the trial of a complaint to bind one over to keep the peace, the defendant is discharged, and the justice of the peace renders judgment against the prosecutor for costs, on the ground that the complaint was malicious, the latter has the right to appeal to the circuit court from such judgment against him for the costs, he being a defendant as to that judgment.

2. **SAME**—*of the questions arising on such appeal.* In such case the defendant in the original proceeding can not be again tried. The appeal only presents the rightfulness of the judgment against the prosecutor for the costs of the original prosecution.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Ford county.

Benjamin Berman made complaint before a justice of the peace against Benjamin F. Payne, charging him with threats against the person of the complainant. Payne was accordingly arrested upon a warrant in the name of The People, etc., brought before the justice, and tried, whereupon the justice found that the "case was commenced maliciously, and without probable cause," and entered judgment that Berman "pay the costs of the prosecution, and that *plaintiffs* have and recover judgment against him for the said costs, taxed at \$43.80." From this judgment Berman appealed to the circuit court. That court, on motion, dismissed the appeal from the judgment of the justice of the peace, upon the ground that Berman had no right of appeal from such a judgment given by statute, and entered judgment against Berman, and in favor of Payne, for the costs incurred by Payne in the proceeding in the circuit court. From this judgment Berman

Briefs of Counsel. Opinion of the Court.

appealed, and on hearing, the judgment of the circuit court was affirmed in the Appellate Court for the Third District. To reverse this judgment of the Appellate Court, Berman brings the record here upon writ of error.

Messrs. TIPTON & RYAN, for the plaintiff in error, in support of the right to bring in review the judgment against him for costs, cited *Kimball v. Riter*, 25 Ill. 276; *Holliday v. Sugart*, 56 id. 44; *Reiman v. Ater et al.* 88 id. 300.

It could make no difference that the proceeding was in the name of the People against another person. *Huskins v. The People*, 82 Ill. 195; *Webster v. The People*, 14 id. 366.

Mr. JAMES McCARTNEY, Attorney General, for the People, insisted there was no such right in the plaintiff in error. One who is not a party to a suit can not appeal. *Rorke v. Goldstein*, 86 Ill. 568. Sec. 329, chap. 38, Rev. Stat. excludes the plaintiff in error from the right of appeal.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This case presents the question whether an appeal to the circuit court will lie from the judgment of a justice of the peace for costs, rendered against the prosecuting witness, upon the trial of a cause instituted under div. 5 of our Criminal Code, to prevent a breach of the peace, upon the finding by such justice, under sec. 323, "that the prosecution was commenced maliciously, without probable cause."

The right of appeal is a statutory right, and can not be sustained unless provided by statute. The proceeding in question is authorized by div. 5 of chap. 38, Rev. Stat. 1874, wherein the jurisdiction to render such judgment is conferred upon justices of the peace. Jurisdiction in certain other criminal matters is conferred upon justices of the peace by div. 9, of the same chapter, and in sec. 389 (found in the latter division) it is provided, that "the defendant may appeal

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from the judgment of the justice of the peace in criminal cases, to the circuit court." If this judgment be held to be in a criminal case, and if the party appealing be a "*defendant*," the right to appeal is expressly given by this section.

The proceeding in question is of a dual character. The primary proceeding is against the person charged with threatening a breach of the peace. In *this* the People of the State of Illinois are plaintiffs, and the party so accused is the defendant. If he be discharged by the justice of the peace, another and secondary proceeding is authorized by this statute, in which the accuser in the primary proceeding becomes the accused in the secondary proceeding, charged with the offence of having instituted the primary proceeding "maliciously, without probable cause," and if found guilty of that offence is to be punished by a judgment against him for the amount of the costs in the whole proceeding. In this secondary proceeding, whatever may be the form of the entries, it is plain the People of the State of Illinois properly occupy the position of plaintiffs, and the prosecuting witness in the primary proceeding is the real defendant. The judgment rendered by the justice in this case is "that the complainant" in the primary proceeding, "Ben Berman, pay the costs of the prosecution, and that the plaintiffs" (the People) "have and recover judgment against him for the said costs, taxed at \$43.80." Berman is clearly the defendant in this judgment, and if execution issued thereon, its appropriate form would be to collect a sum adjudged against him in a proceeding in which the People, etc., were plaintiffs, and the said Berman defendant. It is, in this regard, not unlike proceedings for contempt in chancery causes to enforce for a party some order of the court. Whatever the relation of the party charged with contempt may be to the chancery cause, he takes in the proceeding for contempt the position of defendant, against the People as plaintiffs.

Syllabus.

In view of the real nature of this judgment, and in view of the general policy of our statutes as to appeals from final judgments rendered by justices of the peace, we can not doubt that the case comes within the terms of the statute, when properly construed. The circuit court, therefore, was in error in refusing to entertain the appeal. The question is asked, what is to be tried at the hearing in the circuit court? Certainly Payne is not to be tried again, for he was discharged by the justice, and no appeal lies to that judgment. The only question for the circuit court is, was the prosecution of Payne commenced by Berman "maliciously, without probable cause;" and the case ought to be entitled, "The People, etc. v. Berman, accused of malicious prosecution without probable cause."

The judgment of the Appellate Court is therefore reversed, and the cause remanded for further proceedings in accord with the views here expressed.

Judgment reversed.

MR. JUSTICE WALKER: I am unable to concur in this case.

ROBERT L. DULANEY

v.

ALEX. M. PAYNE et al.

Filed at Springfield January 16, 1882.

1. ACTIONS—*splitting entire cause of action.* A party can not divide an entire demand or cause of action, and maintain several suits for its recovery; and a recovery for a part of an entire demand will bar an action for the remainder, if due at the time the first action was commenced.

2. SAME—as to several distinct causes of action. Where a plaintiff has several distinct causes of action, he may elect to sue upon one, or any one of them he chooses, and he has the further election to unite in one suit, under certain restrictions, several causes of action.

Brief for the Appellant.

3. SAME—*what are distinct causes of action—of a note with interest payable in installments.* Where a promissory note is given, payable in two or more years, with interest payable annually, or semi-annually, the holder may, at the end of each year, or half year, as the case may be, sue and recover the interest, and this will be no bar to a suit on the note when it shall become due.

4. Where a note is given, payable in one year, with interest payable semi-annually, and a suit brought two years thereafter to recover the installments of interest then due, and a recovery therein, such judgment will be no bar to a subsequent action on the note to recover the principal. In such case, the promise to pay interest is a distinct cause of action from the promise to pay the principal. Each promise constitutes a distinct cause of action.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Edgar county; the Hon. C. B. SMITH, Judge, presiding.

Messrs. GOLDEN & WILKIN, for the appellant:

A note payable in one year, with interest payable semi-annually, comprises two distinct contracts,—one to pay the principal sum, and the other to pay the interest. A judgment after the principal is due, in an action for interest, does not merge both contracts. *Freeman on Judgments*, sec. 238; *Andover Savings Bank v. Adams*, 1 Allen, 28; *Sparhawk v. Wills*, 6 Gray, 163; *Florence v. Jennings*, 2 C. B. (N. S.) 454.

The contract ought to be construed precisely as if the words "till paid" had been inserted therein after the words "from date." *Cecil v. Hicks*, 29 Gratt. 1; S. C. 26 Am. R. 391.

When a note is given, with interest *annually*, at ten per cent, the payee may sue for and recover interest at the expiration of each year. *Walker v. Kimball*, 22 Ill. 527.

Several promissory notes, and other instruments and promises executed at the same time, and in reference to the same subject matter, are frequently referred to as constituting one contract. *Davis v. McVickers*, 11 Ill. 327; *Bailey v. Cromwell*, 3 Scam. 71; *Duncan v. Charles*, 4 id. 261.

Brief for the Appellees.

The theory of interest, when there is no express contract to pay it, is, that it takes the shape of damages for detention. *Walker's Am. L.* (5th ed.) 438.

Much confusion has resulted from confounding interest by contract with interest by operation of law. The latter is strictly in the nature of damages. *Selleck v. French*, 1 Conn. 32; *Adams v. Bank*, 36 N. Y. 255; *Brackett v. Edgerton*, 14 Minn. 174; *Adams Express Co. v. Milton*, 11 Bush, 49; *Mason et al. v. Callender et al.* 2 Minn. 350; *Madison County v. Bartlett*, 1 Scam. 67; *Sedgwick on Dam.* 440.

The contract rate of interest must govern both before and after the note matures. *Brannon v. Hursell*, 112 Mass. 63.

The demand of principal and interest upon a covenant to pay a specified sum with interest, is divisible. *McClure et al. v. Cole*, 6 Blackf. 290; *Venney v. Iddings*, 2 Chitty, 234.

The rule is settled in Illinois that the conventional rate of interest obtains after maturity as well as before, and so long as the debt "remains a note." *Etnyre et al. v. McDaniel*, 28 Ill. 201; *Phinney v. Baldwin*, 16 id. 108.

The same rule prevails in Massachusetts. *Brannon v. Hursell*, 112 Mass. 63.

Mr. O. B. FICKLIN, and Mr. JAS. A. EADS, for the appellees :

A plaintiff can not divide an entire demand, or cause of action, so as to maintain several suits for its recovery, and a recovery for a part thereof is a bar as to the remaining portion. *Camp v. Morgan*, 21 Ill. 257; *Casserly v. Forquer*, 27 id. 170; *Matthias v. Cook*, 31 id. 87; *Lucas v. Lecompt*, 42 id. 305; *Gaddis v. Gleason*, 55 id. 522; *Chicago and Northwestern Railroad v. Nichols*, 57 id. 464; *Clays v. White*, 83 id. 542; *Rosenmueller v. Lecompt*, 89 id. 213; *Nickerson v. Rockwell*, 90 id. 463; *Bogart v. Williams*, 3 Barn. & Cress. 235; *Bendernagle v. Cocks*, 19 Wend. 206; *Secor v. Sturgis*, 17 N. Y. 548; *Pinney v. Barnes*, 16 Conn. 428; *Shepardson v. Cary*, 29 Wis. 34; *Covington v. Sargent*, 27 Ohio, 237;

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Baird v. United States, 6 Otto, (96 U. S.) 432; *Wait's Actions and Defences*, vol. 6, p. 776.

In a suit upon a judgment, the debt and costs are held to be one entire cause of action, and not severable. *Camp v. Morgan*, 21 Ill. 257; *Clays v. White*, 83 id. 541.

A contract to build a certain number of box cars at a fixed price, is an entire contract, and not severable. *Chicago and Northwestern Railroad v. Nichols*, 57 Ill. 463.

A contract for one year, and continued by the parties for another year, is one entire contract. *Rosenmueller v. Lecompt*, 89 Ill. 215.

That a promissory note is an entire contract, and can not be divided: *Matthias v. Cook*, 31 Ill. 87; *Howe v. Bradley*, 19 Me. 31; 3 *Parsons on Contracts*, (6th ed.) 188; *Miller v. Bledsoe et al.* 1 Scam. 531; *Buckner v. Thompson*, 11 Ill. 564; *Camp v. Morgan*, 21 id. 255; *Nickerson v. Rockwell*, 90 id. 464.

Opposed to the principles established by the foregoing authorities are three Massachusetts cases: *Badger v. Titcomb*, 15 Pick. 409; *Sparhawk v. Wills*, 6 Gray, 163; *Andover, etc. v. Adams*, 1 Allen, 28.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by Robert L. Dulaney, against Alex. M. Payne, Ed. Harlan, W. T. Martin, Lyman Booth and Dennis Legare, on a promissory note, executed by the defendants, which read as follows:

"\$4262.55. Twelve months after date we, or either of us, promise to pay R. L. Dulaney, or order, the sum of four thousand two hundred and sixty-two and $\frac{5}{100}$ dollars, with ten per cent interest from date, interest payable semi-annually, for value received, this 5th day of April, 1877."

The defendants interposed a plea of former recovery, and the only question presented by the record is, whether the

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judgment read in evidence on the trial of this issue constitutes a bar to a recovery on the note. If it does, the decision of the Appellate Court affirming the judgment of the circuit court was right, and will have to be affirmed. If it does not constitute a bar, then the judgment of the Appellate Court will have to be reversed.

It appears, from the evidence, that all of the parties to the note, except Martin, on the 3d day of April, 1879, in due form executed a power of attorney authorizing and empowering Thos. G. Golden to confess a judgment at the next term of the Clark county circuit court, in favor of Dulaney, for the amount of the interest due upon the promissory note. Martin, having refused to join in the power of attorney, was brought into court by summons, and a declaration having been filed at the April term, 1879, of the court, judgment by default was rendered against Martin, and by confession against the other parties to the note, for the sum of \$869.50, and costs.

There is a slight discrepancy between the judgment and amount of interest due on the note at the time the judgment was rendered, but from the evidence introduced it is apparent that the judgment was for no part of the principal debt, but merely for the interest then due upon the note, and whether the judgment was a little more or less than the real amount of interest, can not have any material bearing on the case. The law is well settled that a party can not divide an entire demand or cause of action, and maintain several suits for its recovery. It is also clear that a recovery for a part of an entire demand will bar an action for the remainder, if due at the time the first action was commenced. *Nickerson v. Rockwell*, 90 Ill. 460, and cases there cited.

The question then arises whether the principal of the note, and the interest accruing thereon semi-annually, is, within the meaning of the law, an entire demand. If it was, the plaintiff was bound, when he brought suit for the interest, to

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include the principal sum due on the note in the action. If it was not, then he had the right to sue for and recover the interest, and afterwards recover a judgment for the principal. As is said in *Phillips v. Bank*, 16 Johns. 136: "It is in the election of the plaintiff, if he has distinct causes of action, to sue upon all or any of them when he pleases, and he has the further election to unite in one suit, under certain restrictions not now necessary to be stated, several causes of action; but the defendant can not compel him to do this."

What constitutes an entire or single demand is often a question of much difficulty, and the decisions of different courts are not in harmony on the question. Where a note is given payable in two or more years, with interest annually, at a specified rate per cent, the holder of the note may, at the end of the year, sue and recover the interest. *Walker v. Kimball*, 22 Ill. 537; *Goodwin v. Goodwin*, 65 id. 497.

The principle, doubtless, which led to this doctrine was, that the promise to pay interest, although connected in the same contract with a promise to pay the principal debt, constituted a separate and distinct cause of action. If this be so, it would seem to follow that a note like the one in question contains two contracts,—one to pay the principal, and the other the interest,—although each originally grew out of one and the same transaction. In the discussion of this question, *Freeman on Judgments*, sec. 238, says: "A note payable in one year, with interest payable semi-annually, comprises two distinct contracts,—one to pay the principal sum, and the other to pay the interest. A judgment after the principal is due, in an action for interest, does not merge both contracts." If the author is correct in his position, the judgment recovered for the interest in this case would be no bar to this action brought to recover the principal. In support of the text the author cites, in a note, two cases, *Andover Savings Bank v. Adams*, 1 Allen, 28, and *Sparhawk v. Willis*, 6 Gray, 163, which fully sustain the doctrine an-

Opinion of the Court.

nounced. In the case of *Sparhawk v. Willis*, the question was whether a judgment for one year's interest on a note for \$4000, payable in one year, with interest annually, was a bar to a recovery of the principal, and the court held that it was not. In deciding the case the court said: "The contract thus assumes a very simple form: 'I promise to pay the debt in one year; but if I do not, I will pay the interest at that time, and so at the end of each and every year until the debt is paid.' Being a promise to pay the debt at one time, and contingently to pay the interest at another or some other times, it must be construed as containing distinct promises, giving several causes of action, and these being several in their origin, no subsequent event can make them one and entire." The case of *Andover Savings Bank v. Adams*, is to the same effect. It is there said: "The promises to pay the debt at one time, and the interest at another, are several, and afford several and distinct causes of action." These two cases are directly in point, the question presented and decided being the same as is involved in the case under consideration.

In *Parsons on Contracts*, vol. 2, p. 636, a contrary doctrine is announced. The author says: "One holding a note on which interest is payable annually or semi-annually, may sue for each installment of interest as it becomes payable, although the note is not yet due; but after the principal becomes due the unpaid installments of interest become merged in the principal, and must therefore be sued for with the principal, if at all." In support of the rule announced, the author, in the note, cites *Howe v. Bradley*, 19 Maine, 31. In the case cited it was held that annual interest can not be recovered by a separate action after the principal has become due. This decision was made by a divided court, and although it may sustain the rule laid down by *Parsons*, we are not inclined to follow it, believing, as we do, that the rule established by the courts in Massachusetts is the better doctrine, and more calculated to further the ends of justice.

Opinion of the Court.

If an action may be maintained to recover annual interest before the principal sum becomes due, as this court has in a number of cases held it may, no good reason is perceived which will preclude a recovery of the interest after the maturity of the principal debt as well as before. *Secor v. Sturgis*, 16 N. Y. 548 has been cited as an authority bearing on the question. It is there said: "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is that the former arise out of one and the same act or contract, and the latter out of different acts or contracts."

While we fully recognize the ability and learning of the court which declared the doctrine in the case cited, we can not sanction the rule declared. Several promissory notes may, and often do, grow out of one and the same transaction, and yet they do not constitute an entire demand. On the contrary, the holder may maintain separate actions for the recovery of each. For instance, A may loan B \$6000, and as evidence of the debt take three promissory notes, of \$2000 each. Now, while the notes all grow out of one transaction and one contract, they are several, and a separate action may be brought upon each one of them. The fact, therefore, that the two agreements in the note in question, one to pay the interest at a specified time, and the other to pay the principal, grew out of one and the same contract, does not establish that the demand is single and entire.

Several decisions of this court have been cited by appellees as authority to sustain their position. Upon an examination, however, we do not find any of them in point. In the most of the cases cited the questions before the court involved a construction of sec. 49, chap. 79, Rev. Stat. of 1874, which requires all demands which do not exceed \$200 to be consolidated in actions before justices of the peace. What may have been said in such cases can have no bearing here. The note upon which this action was brought provided that the

Syllabus.

interest should be paid semi-annually, while the principal debt became due in one year from the date thereof. It is but reasonable to presume, from the nature of the transaction, that it was contemplated by the parties, although the note was by its terms due in one year, that it should run for a longer term, but that the interest should be paid every six months. Under such circumstances it would be manifestly unjust to hold that a judgment for the interest after the maturity of the note would bar a recovery of the principal, and we are unable to sanction authorities which establish such a rule. If a separate action may be maintained upon each one of several notes which grow out of a single contract, upon the same principle and for the same reason a note containing a promise to pay interest at one time and the principal debt at another, may be the foundation of one action to recover the interest, and another to recover the principal.

The judgment of the Appellate Court will be reversed, and the cause remanded.

Judgment reversed.

Mr. JUSTICE SCHOLFIELD took no part in the consideration or decision of this case.

JAMES M. BOOKER

v.

THE VENICE AND CARONDELET RAILWAY COMPANY.

Filed at Mt. Vernon January 18, 1882.

101	333
139	150
101	333
161	644
101	333
173	524

1. RIGHT OF WAY—*sufficiency of petition as to inability to agree with owner.* An allegation in a petition by a railway company to condemn land for a right of way, that the petitioner "has not been able to acquire the title, nor the right of way over the land, by purchase or by voluntary grant from" the defendants, though not formal, is substantially sufficient under the statute, as showing an inability to agree as to the compensation to be paid.

Opinion of the Court.

2. SAME—as to condemning strip exceeding one hundred feet in width for right of way of railroad—waiver of objection. A judgment condemning a strip of land one hundred and twenty feet wide for a right of way for a railway will not be reversed because the land condemned exceeds one hundred feet in width, where it does not appear from the record that the additional twenty feet was not necessary, by the pleadings, and no such objection was raised before the court below, either by demurrer or reasons assigned in arrest of judgment. The objection not being made below, must be considered as waived.

3. SAME—measure of compensation to lessee of premises. In a proceeding to condemn land for a right of way, the jury allowed a lessee of the land taken, whose lease had three years to run, the amount of rent he was to pay per acre for the whole term, as to the land condemned, while he contended that for gardening purpose it might yield much more. There was no proof that it would be used for such purpose, and no other damages shown, and it appeared that the lessee had the option of terminating the lease at any time: *Held*, that the verdict would not be set aside as against the evidence, and that future profits of the land taken were too uncertain to be depended upon as a measure of damages.

APPEAL from the County Court of St. Clair county; the Hon. F. H. PIEPER, Judge, presiding.

Mr. FRANK B. BOWMAN, for the appellant.

Messrs. G. & G. A. KÖRNER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The Venice and Carondelet Railway Company presented a petition to the county judge of St. Clair county, in vacation, for the purpose of condemning the right of way on which to construct its track over certain lands in that county. The lands are specifically described by metes and bounds. They are alleged to belong to John B. Bowman, and that James M. Booker claims a possessory right in one of the lots, which it is alleged will continue until the first day of September, 1881. It is alleged that the company was not able to acquire the title or the right of way over the premises by purchase or voluntary grant from Booker or Bowman. The petition prays for a summons, and that the damages be ascertained

Opinion of the Court.

according to law. The county judge indorsed an order for a summons, and fixed the time for a hearing on the 24th of June, 1881, and the same was filed on the 10th of that month, and a summons was issued, returnable as ordered. The sheriff returned that he had served Booker on the eleventh, and Bowman on the fifteenth of the month. Booker filed an answer, in which he denies all of the allegations in the petition, except that he has an interest in lot 47 of Cahokia commons. He alleges that he holds a written lease for the same, dated March the 1st, 1880, for the term of five years; that he is residing thereon, and claims that the taking of the right of way will damage him \$1000. A hearing was had as to Booker on the day set for trial, but as to Bowman the cause was continued until the 27th of the month. The jury assessed the damages sustained by Booker at \$70. Motions for a new trial and in arrest of judgment were entered, but overruled by the court, and a judgment that petitioner might enter on paying the \$70. An appeal was prayed and granted, and the record is brought to this court, and errors assigned by appellant.

It is insisted, that this being a statutory proceeding, according to uniform authority every requirement of the statute must appear by the record to have been pursued, and nothing can be presumed in its favor; that under this rule the petition is fatally defective in failing to allege that the compensation to be paid for or in respect of the property sought to be appropriated or damaged for such purpose, could not be agreed upon by the parties; that this is the requirement of the statute, and an inability to agree upon the compensation to be made for the damages sustained, is indispensable to give the court jurisdiction of the subject matter of the dispute; that the allegation that petitioner "has not been able to acquire the title, nor the right of way over the land, by purchase or by voluntary grant, from said Bowman or Booker," is not a sufficient compliance with this

Opinion of the Court.

requirement of the statute. We do not understand that strictness requires the averment to be in the precise language of the statute. Any allegation that is equivalent is all that strictness requires. From this allegation there can be no other inference than that the effort had been made, and the compensation could not be agreed upon by the parties. If it had, then the company would then have been able to acquire the right of way by purchase. Had the compensation been agreed upon, that would have been to purchase the right; if an agreement had been reached that the company should have the right of way without compensation, that would have rendered the proceeding unnecessary; but such an agreement is negated by the allegation. The averment necessarily implies that an effort had been made, and that an agreement for compensation could not be arrived at by the parties, and they were unable to agree that damages should be waived. We regard the allegation, although not formal, as being in substance sufficient.

It is next urged, that the condemnation was of a strip 120 feet wide, when the statute only authorizes a strip of 100 feet in width to be condemned for right of way, and the petition proceeds for right of way, and the proceeding must be confined to the petition. The 20th section of chapter 114 authorizes the condemnation of 100 feet for right of way, and a greater width, when necessary, for cutting or filling, and it does not appear that the additional 20 feet were not necessary for that purpose. Again, no such objection was raised by demurrer, or on the motion in arrest of judgment. This objection is not found in the reasons assigned for arrest of judgment, and it must be considered as waived, and can not be urged for the first time in this court.

It is urged that the company failed to prove that the parties had been unable to agree upon the compensation for the damages arising from the appropriation of the strip for right of way. Westerman, the engineer of the road, testified,

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that he tried to purchase the strip for the railway company from Booker, but they had been unable to agree. This evidence was, we think, sufficient to prove that the parties were unable to agree upon the compensation that should be made.

It is claimed that the jury found against the evidence in assessing the damages. It seems they allowed appellant the sum per acre that he agreed to pay his landlord as rent for the ground. There were about three and a half acres, and the lease had three years to run, and there were witnesses who testified that for gardening purposes each acre would net \$25. It is a complete answer to say there is no evidence that it would be used for such purpose, nor that it could be rented for such a price for that purpose. Again, the lessee had the option of terminating the lease as to any portion, or all, of the premises, at any time he might choose, by paying Bowman \$4 an acre; and all know that all theories about the production of the soil depend on so many contingencies, that future profits are uncertain, and can not be depended upon as a measure of damages. These were, all of them, considerations for the jury, and they seem very properly to have allowed him simply the amount of rent he was liable to pay his landlord. It is said, they should have allowed him other damages he sustained. It is enough to say, none other were proved.

We perceive no error for which the judgment should be reversed, and it is affirmed.

Judgment affirmed.

Syllabus.

WILLIAM SCHUCK

v.

JOHN GERLACH, Sheriff, etc.

Filed at Mt. Vernon January 18, 1882.

1. **REDEMPTION**—*what judgment creditor may redeem.* Where land is sold under a decree of foreclosure on a bill in which the heirs of the deceased mortgagor are made parties, a judgment creditor of one of the heirs may redeem from such sale such heir's interest, and have the same sold under his execution.

2. **SAME**—*may be of an undivided interest.* Under the present statute one of several joint owners of land sold under execution, or decree of foreclosure, may redeem whatever interest he has in the same, and so also a judgment creditor of a joint owner may redeem the interest of his debtor.

3. **SAME**—*former decision.* The ruling on this question in *Durley v. Davis*, 69 Ill. 133, that a judgment creditor of one of several persons owning land as tenants in common, could not redeem from an execution sale of the entire premises, as to the interest of his debtor, by paying a proportionate part of the amount for which the land was sold, is no longer the law, under sec. 26, ch. 77, Rev. Stat. 1874, p. 625.

4. **SAME**—*as to part not previously redeemed.* A judgment creditor of a deceased mortgagor, whose claim has been allowed against the estate of the mortgagor, may, after two-fifths of the premises have been redeemed and sold by judgment creditors of the heirs, redeem the remaining three-fifths upon a special execution from the county court.

5. **SAME**—*irregularity in execution will not defeat redemption.* An execution was sued out of the county court on a claim allowed against the estate of a deceased mortgagor, in the name of the assignee of the claim, under which the assignee, as a judgment creditor, redeemed land of the mortgagor sold under decree of foreclosure: *Held*, that while it was irregular to issue the execution in the name of the assignee, it was not void, and that in a collateral proceeding it could not be attacked, and that the redemption under it was valid.

6. **SAME**—*avored.* Redemptions are looked upon with favor, and where no injury is to follow, a liberal construction will be given to redemption laws, to the end that the property of the debtor may pay as many of his liabilities as possible.

APPEAL from the Circuit Court of Randolph county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

101	338
148	255
148	618

Statement of the case.

This was a petition for a writ of *mandamus*, brought by appellant, to compel the execution by appellee, sheriff of Randolph county, of a deed for the lands described in the petition, under substantially the following facts :

At the September term, A. D. 1879, of the Randolph county circuit court, one Roxana Phillipps obtained a decree of foreclosure against James B. Vinson, Mary A. Vinson, Margaret Vinson, and Elizabeth Kelley, the heirs of Alfred L. Vinson, deceased, and Robert H. Mann, administrator of his estate, upon a trust deed given by Alfred L. Vinson, in his lifetime, upon the lands. At a sale under the decree, by the master in chancery, on the 24th day of November, 1879, Roxana Phillipps purchased the lands. On the 23d day of February, 1881, one Thomas A. Simpson, having an allowance of record in the county court of Randolph county against the estate of Alfred L. Vinson, sued out a special execution, for the purpose of redeeming these lands, and deposited with the appellee the amount of money due Roxana Phillipps, whereupon appellee issued a certificate of such redemption, and levied the special execution upon the lands. At the sale under this execution, on the 25th day of March, 1881, Schuck, the appellant, purchased the land, and appellee issued to him a certificate of purchase therefor. On the 19th day of March, 1881, one Sarah Phillipps caused an execution to issue out of the office of the clerk of the Randolph county circuit court, upon a transcript judgment in favor of Ellen Cragan, and against James B. Vinson, and deposited with the appellee one-fifth of the amount of money due appellant, for the purpose of redeeming the undivided one-fifth of said premises from appellant, whereupon the appellee levied upon the undivided one-fifth of said premises, and sold the same as the property of James Vinson, the defendant in such execution. On the 20th day of May one Samuel S. Simpson, having a judgment against Elizabeth Kelley, and Stephen Kelley, her husband, in the Randolph county circuit court, caused execu-

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tion to issue, and deposited with appellee one-fifth of the amount due appellant, for the purpose of redeeming the undivided one-fifth of said premises from appellant, whereupon the appellee levied the execution upon the undivided one-fifth of said premises, and sold the same as the property of Elizabeth Kelley, one of the defendants in the execution. On the 19th day of May, 1881, one Albert Phillipps, assignee of one Walter Lanham, who had an allowance against the estate of said Alfred L. Vinson, deceased, sued out a special execution for the purpose of redeeming the undivided three-fifths of said premises from the appellant, and deposited with the appellee three-fifths of the amount due appellant, whereupon appellee levied upon the undivided three-fifths of said premises, and after giving notice sold the property.

Appellant denied the right of these various persons to redeem the lands in the manner stated, and refused to accept all sums of money deposited with appellee, and on the first day of June, 1881, demanded of appellee a deed for the premises upon his certificate of purchase, which deed appellee refused to execute, and appellant brought this petition for a writ of *mandamus* to compel the appellee to execute the deed.

Mr. JAMES J. MORRISON, for the appellant.

Messrs. JOHNSON & HORNER, for the appellee.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

It appears from the record that Alfred L. Vinson, the mortgagor, after the execution of the mortgage, and before the filing of the bill to foreclose, in August, 1878, died intestate, leaving as his only heirs his mother, Mary A. Vinson, and James B. Vinson, a brother, and Margaret Vinson and Elizabeth Kelley, his sisters. These heirs, and the administrator of the estate, were made parties defendant to the bill. A

Opinion of the Court.

decree was rendered, the mortgaged premises sold, but no redemption was made within a year, and the first question presented by the record is, whether a person holding a judgment against either of the defendants, James B., Mary A., Margaret Vinson, or Elizabeth Kelley, can be regarded as judgment creditors within the meaning of the statute, and entitled to redeem from the foreclosure sale under the mortgage.

We do not regard the point presented an open question in this State, but on the other hand, the right of such a creditor to redeem as a judgment creditor, within the meaning of the statute, was fully settled in *Lamb v. Richards*, 43 Ill. 312. In that case, Richards, after having executed a mortgage on certain lands, conveyed the same to Lamb. The administrator of the estate (Richards having died) and Lamb were made parties defendant to a bill to foreclose the mortgage, a decree of foreclosure was rendered, the land sold, and after the expiration of twelve months the judgment creditors of Lamb were allowed to come in and redeem from the sale under the mortgage as judgment creditors, within the meaning of the statute. Here, the Vinson heirs, who were defendants in the foreclosure proceedings, occupy precisely the same position that Lamb occupied in the case cited, except that here they acquired title to the mortgaged premises by descent, while in the case cited Lamb acquired title by purchase from the mortgagor, which can make no difference. The Vinsons occupy the same position that they would had they obtained title by deed from the mortgagor. *Lamb v. Richards* must, therefore, be regarded as conclusive upon the question that a creditor holding a judgment against one of the Vinsons had the right, under the statute, to redeem from the mortgage sale as a judgment creditor.

It is claimed that redemption could not be made of an undivided interest,—that the whole sum for which the land sold, with interest, should have been paid, in order to effect

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a redemption. The position of appellant on this point, under the statute of 1845, would no doubt be correct, as held in *Durley v. Davis*, 69 Ill. 133; but under our present statute a joint owner of land sold may redeem whatever interest he has in the land sold, upon payment of his proportion of the amount which would be necessary to redeem the whole. So, also, a judgment creditor of a joint owner may redeem. (Sec. 26, Rev. Stat. 1874, p. 625.)

It is next urged, that the attempted redemption of Albert Phillipps of the undivided three-fifths of the land purchased by Schuck was unauthorized. After appellant had made a redemption from the mortgage sale, and become the purchaser of the premises himself, judgment creditors of the mortgagor, Alfred L. Vinson, had sixty days allowed them to redeem from him. Before Phillipps undertook to make a redemption, two-fifths of the premises had been redeemed, and when he, as a judgment creditor, undertook to redeem, three-fifths only of the land remained subject to redemption. But no reason is perceived which would prevent him from redeeming such portion of the lands as had not been redeemed, if he saw proper to do so. He was a judgment creditor of the original mortgagor, and under the statute he had a right to redeem any part or portion of the lands which had not been redeemed when he undertook to effect a redemption. The statute gave him the right of redemption, and the fact that other creditors had preceded him and redeemed a portion of the lands sold, did not deprive him of the right conferred by the statute, so long as any of the lands remained unredeemed. The claim upon which Phillipps redeemed was allowed in the county court, in the name of Walter Lanham, and assigned to Phillipps. It was no doubt irregular to issue the special execution in the name of Phillipps, but the execution was not for this reason void, and in this collateral proceeding its validity can not be questioned by appellant. Redemptions are looked upon with favor, and when no injury

Syllabus. Statement of the case.

is to follow, a liberal construction will be given our redemption laws, to the end that the property of the debtor may pay as many of the debtor's liabilities as possible. Here the full amount of the redemption money due appellant under the law is in the hands of the officer, subject to his order, and he can suffer no loss by the decision of the circuit court holding that the lands were redeemed in conformity to the statute.

The judgment will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* W. D. Kerfoot

v.

JACOB GROSS, Clerk Circuit Court, etc.

Filed at Mt. Vernon January 18, 1882.

FEES of clerks of circuit courts—in counties of third class—where several defendants plead jointly. Under sec. 33, chap. 53, of the Revised Statutes, relating to Fees and Salaries in counties of the third class, if one of several defendants, acting separately from the others, wishes to enter his appearance, or to plead, answer or demur, in his own behalf, he must, before doing so, pay a fee to the clerk of \$1.50; but when two or more defendants wish to enter their appearance, or to plead, answer or demur jointly, they are to jointly pay \$1.50, and not each to pay that sum.

This was an application in this court by the relator, against Jacob Gross, clerk of the circuit court of Cook county, for a *mandamus* to compel him to receive and file a certain paper entering the appearance of a number of defendants in a certain cause in chancery, upon payment of \$1.50 for all, which had been tendered to the clerk and refused by him, he demanding the payment of the further sum of \$36, and claiming he was entitled to the same under the statute, as fees for the defendants named in the writing, to be paid in advance to him as clerk of the court.

Opinion of the Court.

Mr. W. T. BURGESS, for the relator.

Mr. CONSIDER H. WILLETT, for the respondent.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

The decision of this case depends upon the construction to be given to sec. 33, chap. 53, of the Revised Statutes, on the subject of Fees and Salaries in counties of the third class. So much of the statute as comes in judgment is in these words: "At the time of the commencement of every suit at law or in equity, in any court of record, in counties having a population exceeding seventy thousand inhabitants, in this State, the party or parties commencing such suit, or in case of an appeal from an inferior court, the party or parties, appellant or appellants, or in case of an application for judgment upon any special assessment or special tax levied by any incorporated town or city, such town or city, shall pay to the clerk of the court the sum of \$6, to be taxed as costs in the suit, which said sum shall be in full payment for all services of such clerk on behalf of the plaintiff or plaintiffs, complainant or complainants, petitioner or petitioners, appellant or appellants, in the progress of such suit from the commencement to the final termination thereof, except the making of copies of papers or orders, a complete record, or a record for a higher court. And in case of any application for judgment for city, county, State, town or other general taxes, there shall be paid to the clerk, by the corporation so applying for judgment, the sum of three cents for each and every tract of land upon which judgment shall be rendered by the court, which said sum shall be in full payment for all services to be performed by such clerk in the progress of such suit, upon such application, from its commencement to the final termination thereof. And the defendant or defendants, respondent or respondents, appellee or appellees,

Opinion of the Court.

before he, she or they shall be entitled to enter his, her or their appearance, or file any pleas, answer or demurrer in any suit at law or in equity, shall pay to the clerk of the court the sum of \$1.50, to be taxed as costs in the suit, which in like manner shall be in full payment of and for all services rendered or to be rendered by the clerk, for or on behalf of the defendant or defendants, respondent or respondents, appellee or appellees, in or during the progress of such suit to the final termination thereof, except for the making of copies of papers or records, a complete record, or a record for a higher court."

It is contended by the defendant that when several defendants come together into court, and in a body enter their appearance, file pleas, or answer or demur, the law in such case requires each of such defendants to "pay to the clerk of the court the sum of \$1.50, * * * in full payment of and for all services rendered or to be rendered by the clerk, for or on behalf of each of said defendants, during the progress of the suit." The relator contends, that "the sum of \$1.50" is to be paid, not by each of such defendants, but by all such defendants as enter their appearance together, or plead together, or answer or demur together.

We are of opinion that the position of the relator is the one indicated by the terms of the statute. The statute provides for two classes of contingencies or cases—the first, when a defendant (one defendant acting separately) wishes to enter his appearance, or to plead, answer or demur on his own behalf,—in such case such defendant must, before doing so, pay \$1.50. The second case is, where two or more defendants wish to enter their appearance, or to plead, answer or demur together, they are jointly to pay the \$1.50. The statute does not say that in such case each shall pay the \$1.50, and we do not think means that each shall do so. Of course, when such payment has once been made, it is in full for all subsequent clerk's fees otherwise chargeable to any of

Syllabus.

such defendants, except such as are excluded from the operation of this statute.

The language of the section is involved, and if what is said as to each of the cases provided for in the statute be stated separately, the meaning will perhaps be more apparent. The section provides, as to a single defendant, as follows: "And the defendant, respondent or appellee, before he or she shall be entitled to enter his or her appearance, or file any pleas, answer or demurrer, * * * shall pay," etc.; and as to the case of two or more, the provision is: "And the defendants, respondents or appellees, * * * before they shall be entitled to enter their appearance, or file any pleas, answer or demurrer, * * * shall pay," etc.

We are clearly of opinion that in this controversy the law is with the relator. The peremptory *mandamus* sought in the petition is therefore awarded.

Mandamus awarded.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

F. STAHL.

Filed at Mt. Vernon January 18, 1882.

1. BOUNDARIES—DESCRIPTION—mistake in surveyor's certificate—controlled by monuments. A mistake in the surveyor's certificate, attempting to give a description of the land actually surveyed and platted into town lots, describing the town as being on a different quarter of the proper section, does not render the survey and subdivision of the property into lots and blocks uncertain, and for that reason void, when the monuments planted by the surveyor at the time of the survey, fix the boundaries of the survey definitely and certainly.

2. It is well settled law that the monuments established by a surveyor at the time of making the survey, will always prevail over written descriptions, when a contradiction exists.

101	346
136	342
101	348
145	566

101	346
e196	1859

Opinion of the Court.

3. DESCRIPTION—*of its sufficiency, generally.* Any description of land or a lot, for purposes of taxation, by which it may be identified by a competent surveyor with reasonable certainty, either with or without extrinsic evidence, is sufficient.

4. TAXATION—*personal judgment for taxes—its effect upon the lien—and the right to a judgment against the land.* The recovery of a personal judgment by the State, against the owner of real estate for taxes due thereon, does not discharge the lien given by the statute for such taxes, and hence is no bar to an application by the collector for judgment against the property. The State may have a personal judgment against the owner for the taxes, and at the same time, or at any other time, enforce payment against the land itself by a proceeding *in rem*; but the payment of either judgment will be a satisfaction of both.

APPEAL from the County Court of Effingham county; the Hon. JOSEPH B. JONES, Judge, presiding.

Mr. R. C. HARRAH, for the appellant.

Mr. B. F. KAGAY, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an application by the collector of Effingham county, to the county court of that county, for judgment against delinquent lands and town lots for the year 1880, and prior years. Objections made by F. Stahl to any judgment against lots owned by him, were so far sustained that the court only rendered judgment against his lots for the taxes due thereon for the year 1880, but abated the taxes for 1879, and refused to render judgment for back taxes on his lots for the years 1877 and 1878, because an action at law was pending in a court of competent jurisdiction for a personal judgment against the owner for the taxes due for those years. Exceptions were taken to the decision of the court, which have been preserved in the record, in the usual mode, and the People ask to have the judgment of the county court, abating the taxes on objector's lots for 1879, and refusing to render judgment for back taxes due for prior years, reversed.

Opinion of the Court.

Of the objections taken in the county court at the trial, only two are now insisted upon: First, imperfect description of the property; and second, there is now a personal judgment against the owner for the back taxes due on his lots for 1878 and 1877.

The property assessed is lots 1 and 2, in block 17, of the county clerk's subdivision of the north-east quarter of the south-east quarter of section 20, in a town and range stated. The imperfect description insisted upon has no application to the assessment for 1880. His lots were assessed that year by what the owner concedes was a definite and certain description. Judgment was rendered against the property for 1880, and the owner seems to have acquiesced in the decision, as no cross-errors are assigned, and no complaint is made on that score.

It appears that for the prior years the property was assessed in the name of the objector as lots 1 and 2, in block 17, in the town of Effingham, or Effingham proper. The only question made is, whether it is the same property that was assessed to the objector in 1880. As respects the identity of the property, there can not be the shadow of a doubt. The town of Effingham was in fact laid out on the north-east quarter of the south-east quarter of section 20. It was on that tract the surveyor doing the work for the proprietor ran his lines, and divided the ground into lots and blocks, numbered in the usual way, and planted monuments to mark the boundaries of his survey. The plat made by the surveyor, which was acknowledged by the proprietor and was duly recorded, corresponds with the survey actually made. The difficulty, if any exists, arises out of a mistake in the surveyor's certificate, descriptive of the land actually surveyed. It was inadvertently described by him as the north-east quarter of the north-east quarter, instead of the north-east quarter of the south-east quarter of section 20. But that error did not render the survey and subdivision of the property into

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lots and blocks uncertain, and for that reason void. Monuments planted by the surveyor at the time of doing the work, fixed the boundaries of the survey as definitely and certainly as any written description could possibly do. It is well understood law that monuments established by the surveyor at the time of making his survey will always prevail over written descriptions, where a contradiction exists. It seems the county clerk caused the north-east quarter of the south-east quarter to be subdivided precisely as it was originally surveyed for the proprietor laying out the town of Effingham, and under the provisions of the statute had the plat recorded, with a view, no doubt, to put an end to the controversy concerning imperfect descriptions. That neither did any good nor harm. The description was sufficiently definite and certain by the original survey having monuments on the ground actually subdivided, to mark its boundaries, that could be readily discovered. Any surveyor, with the plat, by the aid of the monuments on the ground, could easily locate objector's lots, and identify them as the identical property as described in the county clerk's subdivision of that particular tract of land. Any description of property, for the purposes of taxation, by which it might be identified by a competent surveyor with reasonable certainty, either with or without extrinsic evidence, will be sufficient. *Law v. The People*, 80 Ill. 268; *Fowler v. The People*, 93 id. 116.

The second objection is of more seeming difficulty, because the question made is entirely new in this court, but by the analogies of the law it will admit of a satisfactory answer. It is admitted objector was sued, in 1879, for the taxes due on the lots involved, for the years 1877 and 1878, and judgment rendered against him for such taxes by the justice of the peace before whom the cause was heard, from which objector took an appeal to the county court, and that the suit is still pending and undetermined in that court. The position assumed is, that when a personal judgment is rendered under

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the statute, against the owner, for taxes assessed on his property, such judgment will relieve the land itself from such taxes. The proposition asserted has no authority for its support, at least none has been cited, and certainly none exists in this State. There is nothing in the statute which gives authority to sue for and recover the amount due on forfeited property, in an action of debt against the owner, that indicates the recovery of a personal judgment against the party owing such taxes will relieve his land from such taxes; nor is any reason perceived why such a construction should be given to the statute.

A vendor of land may sue at law upon the note given for the purchase money, and at the same time proceed in equity to enforce a lien reserved in the deed in the nature of a mortgage to secure payment of the note. (*Palmer v. Harris*, 100 Ill. 276.) As respects a note secured by mortgage, the holder may have a personal judgment against the maker for the amount due, and at the same time proceed by bill in chancery to subject the mortgaged premises to its payment. Indeed, he may have several distinct remedies, all of which he may pursue until his debt is satisfied. A personal judgment on the note, against the maker, is no bar to a bill to foreclose the mortgage by which it is secured, and the two suits may be pending at the same time. *Vansant v. Allmon*, 23 Ill. 30.

The statute declares the taxes upon real property, together with all penalties, interests and costs that may accrue thereon, shall be a prior and first lien on such real property, superior to all other liens and incumbrances, from and including the 1st day of May in the year in which the taxes are levied, until the same are paid; and what reason can be fairly assigned why a personal judgment against the owner for the taxes would discharge the lien which the statute gives on his lands to secure the same, any more than a personal judgment against the purchaser would discharge the

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vendor's lien upon the land which secures the purchase money? The cases certainly have a striking likeness, and the principle that controls in one case ought to be applicable in the other. It is well understood a vendor may have a personal judgment against the vendee for the purchase money, and may at any time, by bill, proceed to enforce a vendor's lien against the land itself, and by parity of reasoning the State may have a personal judgment against the owner for the taxes, and at the same time, or at any other time, enforce payment against the land itself by a proceeding *in rem*. In either case, one satisfaction is all that would be allowed. The payment of one judgment would be a satisfaction of the other. Applying the principles of the cases cited, it seems clear the State may pursue cumulative remedies at the same time, until payment of the taxes owing by the citizen may be coerced. That is all that is being done in this case, and the remedies adopted are both allowable under the statute.

So much of the order of the county court as gives judgment against the lots owned by objector for the taxes of 1880, will be affirmed, and so much of it as refuses judgment for the back taxes for the years 1877 to 1879, both years inclusive, will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment affirmed in part and in part reversed.

MONROE C. CRAWFORD *et al.*

v.

RICHARD RICHESON *et al.*

Filed at Mt. Vernon January 18, 1882.

1. **LIEN**—*collector's bond—after-acquired lands.* The statutory lien created by the approval and recording of a collector's bond attaches not only to the lands then owned by the principal, but also to after-acquired lands, the same as in the case of a judgment.

101	351
124	324
125	440
101	351
48a	518
101	351
179	266

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2. **LIEN—SURETY—extension of time for payment of taxes—subrogation of surety.** An act of the legislature extending the time of payment of taxes to a collector of the revenue, with the written assent of his sureties, without notice to the General Assembly that others had purchased lands of the collector after the approval and recording of his bond, will not discharge the lien of the State on such lands, nor prevent the collector's sureties answering for his default from being subrogated in equity to such lien.

3. **SAME—effect of surety taking indemnity from his principal, as to his right of subrogation.** The taking of a mortgage by a surety of a collector as an indemnity against loss, is no waiver of any right of subrogation in favor of the sureties to the lien in favor of the State on the collector's lands, where such sureties have been compelled to pay the State for the default of the collector.

4. **SAME—release by surety of part of his indemnity, without notice of equities in others—effect upon his right of subrogation.** The release by a surety of a county collector of a part of a mortgage given for his indemnification, without notice of the equitable rights of a purchaser of land from the collector which was subject to the lien of his bond, will not defeat the right of this and other sureties of the collector, after having paid judgments against them in a suit on the collector's bond, to be subrogated to the lien created by statute on his lands in favor of the State.

5. **SAME—right of surety to require lien against principal's land to be first enforced.** The sureties upon a collector's bond have the right in equity, upon the recovery of a judgment against them upon the bond, and before its payment by them, to file a bill and require the lands of the collector subject to the lien of his bond, though they have passed into the hands of innocent purchasers, to be sold for the payment of such judgment, and upon supplemental bill showing payment of the judgment, to be subrogated to the lien of the State, and have the lands sold for their reimbursement.

6. **SAME—sale of lands subject to lien, in inverse order of alienation.** Where a statutory lien, as that of a collector's bond, attaches to land, a part of which was acquired after the recording of the bond, and such lands have been sold and conveyed by the collector to different persons and at different times, it is proper to order their sale in the inverse order of their alienation, on bill by his sureties to be subrogated to the lien of the State, and this without regard to the times of acquiring the title to the different parcels which were purchased after the recording of the collector's bond.

7. **LIEN—HOMESTEAD—as to lien of collector's bond.** A homestead not exceeding \$1000 in value, owned and occupied by a county collector as his residence, is not subject to the statutory lien of his bond; but if it exceeds that value, then the excess, but only the excess, is subject to such lien.

8. **SAME—whether lien attaches before the homestead is occupied.** Where, after the recording of a collector's bond, which is declared a lien on all his lands, he purchases land for a homestead, and within a reasonable

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time thereafter moves upon and occupies it as such, the land so bought will be considered as becoming his homestead from the time of acquiring the title, and the lien will not attach, although a short space of time may have intervened between its purchase and occupancy.

9. *SAME—manner of asserting homestead right.* Where a bill to enforce the lien of a collector's bond on land owned and sold by him, before the bond was discharged, alleged that the bond was a lien on the land, which the answer simply denied, it was *held*, that under the issue thus formed evidence of a homestead right was competent, as going to show the bond was never a lien on the land.

10. *SAME—of the right of homestead in case of exchange of lands.* During the pendency of a statutory lien under a collector's bond, the collector acquired a tract of land as his homestead, which he exchanged for another, occupying the latter as a homestead, it was *held*, on bill by the sureties of the collector, who had been compelled to pay on his default, to be subrogated to the lien and have these lands sold under the lien, that in consideration of the equitable rights of purchasers from the collector, the sureties should be subrogated as to only one of the two tracts, viz: the tract last acquired, and as to it only as to the excess in value above \$1000.

11. But where a house and two acres of land not subject to the lien, as being of less value than \$1000, together with twenty-eight acres of land subject to the lien, were exchanged for one hundred and twenty acres of other land and \$1000 in money, it was *held*, that the rule could not be applied, it being no exchange proper, in the legal sense.

APPEAL from the Circuit Court of Perry county; the Hon. W. H. SNYDER, Judge, presiding.

The bill in chancery in this case alleges that Marion D. Hoge was collector of taxes of Franklin county for the year 1867; that on December 5, 1867, he gave bond, as required by the statute, for the faithful performance of his duties as such collector, which was duly approved and recorded, and that the bond was signed by the complainants, and Daniel Mooneyham and Lewis G. Payne, as sureties for Hoge; that there came to the hands of Hoge, as such collector, a large sum of money belonging to Franklin county, which he failed to account for, and that a judgment was afterwards rendered in the Franklin county circuit court against Hoge and his sureties for the amount due the county, which judgment the

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complainants and said Daniel Mooneyham paid and discharged; that the collector was also in default in regard to taxes due the State which he had collected, for which the State recovered judgment in the Supreme Court against him and his sureties, and which was not paid at the time of filing the bill. A supplemental bill was filed, showing that since filing the original bill the latter judgment had been paid and discharged by the complainants and Mooneyham.

The bill alleges that at the date and recording of the bond the collector was the owner of two certain parcels of real estate described in the bill, and that after the date and recording of the bond he became the owner of certain other parcels of real estate, which are described in the bill, with a statement of the date on which he acquired title to each tract, after the recording of the bond; and that the collector sold and conveyed all his real estate before either of the aforementioned judgments was recovered. The bill charges that the bond of the collector, from and after the time it was recorded, became a lien on all the real estate which he owned at the time the bond was recorded, and also upon all the real estate subsequently acquired by the collector, and that the lien is still in force; that Hoge, the collector, and the said Lewis G. Payne, one of the sureties, are both insolvent, and that neither of them paid any part of said judgments. Hoge, and all those claiming title to these lands through him, and the said Payne and Mooneyham, are made defendants to the bill. The prayer is, that enough of the real estate to pay the judgment in the Supreme Court in favor of the State be decreed to be subject to the judgment, and be sold to pay the same, and that the remainder of the real estate, or so much as may be necessary, be sold to pay the complainants, with interest, the amounts by them paid on the judgment in favor of Franklin county. Answers were filed denying the allegations of the bill, proofs taken, and upon hearing, the court decreed according to the prayer of the bill, and that

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the lands be sold in the inverse order of their alienation by Hoge. The defendants appealed.

Messrs. DUFF, CRAWFORD & WILLIAMS, for the appellants :

The statutory lien of a collector's bond does not extend to after-acquired lands. *Calhoun v. Snyder*, 6 Binn. 135; *Roads v. Simms*, 1 Ham. 281; *Harrington v. Sharp*, 1 G. Green, 131; Freeman on Judgments, sec. 367.

Liens of this kind are strictly construed. *Brady v. Anderson*, 24 Ill. 112; *McCoy v. Morrow*, 18 id. 523; *Canal Co. v. Gordon*, 6 Wall. 561.

By accepting and appropriating another indemnity after the default, the complainants lost all right of subrogation to any security in favor of the State. *Cooper v. Jenkins*, 3 Beav. 337; *Cornwell's Appeal*, 7 Watts & S. 305.

By appropriating this indemnity they lost the privilege of sureties, and became principals to that extent. *Smith v. Steel's Estate*, 25 Vt. 427; *Chilton v. Robbins*, 4 Ala. 22; *Silvey v. Dowell et al.* 53 Ill. 260; *Cogswell v. Ruggles*, 62 id. 402.

The right of subrogation by a surety never exists until the whole debt is actually paid. *Field v. Hamilton*, 45 Vt. 35; *Gilliam v. Erselman*, 5 Sneed, 86; *Magee v. Leggett*, 38 Miss. 139; Brandt on Suretyship, sec. 261.

The appellees, by agreeing to the extension of time to Hoge, and stipulating that it should not work their release, waived all right of being subrogated to any supposed lien against the lands of third parties not consenting to the extension. They thereby assumed new relations to the State. *Bailey v. Brownfield*, 8 Harris, 41; *Oakley v. Parsheller*, 10 Bligh, N. R. 548; *Lime Rock Bank v. Mallett*, 34 Maine, 547; Story's Equity Jur. sec. 502b.

The suspension of the remedy is a waiver of the lien, between creditors and third parties. *Au Sable River Boom v. Sanborn*, 36 Mich. 358; *Howe v. Frazier*, 2 Rob. (La.) 424;

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Hartwell v. Smith, 15 Ohio, (N. S.) 200; *Wilbur v. Ross et al.* 26 Ill. 221.

But further, the State, by this extension of time to Hoge, released and discharged all his sureties who did not agree to the extension. *Davis v. People*, 1 Gilm. 409; *People v. Mc-Hatton*, 2 id. 638; *Johnson v. Harker*, 8 Heisk. 388; *Brandt on Suretyship*, sec. 296.

Where property is subject to answer for the debt of another person, it occupies the position of a security or guarantor, and anything which would discharge an individual security, will, under similar circumstances, discharge such property. *Robinson v. Magee*, 1 Vesey, Sr. 251; *Royal C. B. v. Payne*, 19 Grant's Ch. 180; *Christener v. Brown*, 16 Iowa, 130; *Denison v. Gibron*, 24 Mich. 187; *Rowan v. Sharp's Rifle Co.* 83 Conn. 1; *Union Bank v. Govan*, 10 Smedes & Mar. (Miss.) 333; *White v. Ault*, 19 Ga. 551; *Ryan v. Shaw*, 14 Ill. 20.

And where land subject to a judgment lien is sold by the judgment debtor to a third party for its full value, such land occupies the position of security, and is subject to be discharged from the judgment lien by the acts of the creditor, like any other security. *Barnes v. Mott*, 64 N. Y. 377; *Lef-fingwell v. Freyer*, 21 Wis. 392; *Lowery v. McKinney*, 68 Pa. St. 294.

If by this extension of time to Hoge the State lost its lien on these lands, then it had no rights in this subject to which appellees could be subrogated.

As to the right to enforce the statutory lien against lands in case of an exchange, counsel referred to the rule as to dower, showing it could be enforced only as to one tract. 1 Scribner on Dower, 271; *Park on Dower*, 261; 1 *Hilliard on Real Estate*, 168; *Butler & Baker's Case*, 3 Leon. 271.

A judgment creates no lien against the homestead. *Green v. Marks*, 25 Ill. 221; *Pardee v. Lindley*, 31 id. 174; *Hartwell v. McDonald*, 69 id. 293.

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Nor does the lien given by this bond attach to the homestead. *Hume et al. v. Gossett*, 43 Ill. 297.

Nor does this section 5 of the Revenue law "in any way affect the homestead estate." *Trustees of Schools v. Harvey et ux.* 94 Ill. 394.

That a judgment debtor may acquire a homestead free from the lien of any judgment against him, see *Campbell v. McManus*, 32 Texas, 442; *McManus v. Campbell*, 37 id. 267; *Cipperly v. Roads*, 53 Ill. 346; *Culver v. Rogers*, 28 Cal. 250; *Edmonson v. Meacham*, 50 Miss. 35; *North v. Shearn*, 15 Texas, 174; *In re Henker*, 2 Sawyer, 305; *Hawthorn v. Smith*, 3 Nev. 182; *Thompson on Homestead*, secs. 305, 306; *Monroe v. May*, 9 Kan. 466; *Edwards v. Fry*, 9 id. 417.

Mr. W. H. WILLIAMS, for the appellants Overturf, Biby, and the heirs of John McFall, made the following among other legal points:

The right to be subrogated depends upon principles of equity, and not upon contract. *Mathews v. Aiken*, 1 Comst. 595; *Sálmon v. Clagett*, 3 Bland's Ch. 173; *Kirkpatrick v. Hawk*, 80 Ill. 122.

The right of subrogation is an inherent and natural equity, growing out of the circumstances of the case. 24 Miss. 665.

And subrogation is the transfusion of one creditor to another, with the same or modified rights. *Burrell's Law Dict.*, title "Subrogation."

And hence the sureties can obtain no greater right, or attain a better position as regards the principal debtor, than was held by the original creditor. If the creditor has taken collateral security, he holds the same as trustee for the benefit of the sureties. 1 Story's Equity, 477, *et seq.*; *Kirkpatrick v. Hawk*, 80 Ill. 122; *Hall, Admr. v. Hoxsey et al.* 84 id. 618; *Phares v. Barbour*, 49 id. 370.

And if the creditor, without the consent of the surety, releases or discharges such collateral security, the surety is

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discharged to the extent of such collateral security. *Rogers v. School Trustees*, 46 Ill. 428; *Hall v. Hoxsey*, 84 id. 618; *Phares v. Barbour*, 49 id. 370. And we hold the converse of the proposition to be true, that if the creditor, with the consent of the surety, releases such collateral security, such surety is not discharged.

An extension by a creditor to his debtor is a discharge of the surety not consenting thereto. *Woolford v. Daw*, 34 Ill. 434; *Crossman v. Wohlleben*, 90 id. 537; *Davis v. People*, 1 Gilm. 409; *Waters et al. v. Simpson et al.* 2 id. 571; *People v. McHatton*, id. 638; *Governor v. Lagow et al.* 43 Ill. 135.

Then, by consenting to this extension, the sureties are not released, and as to them the act of the legislature and their stipulation amounts simply to a suspension of the remedy. *Parmelee et al. v. Lawrence*, 44 Ill. 405; *Parsons on Contracts*, vol. 1, p. 27; id. vol. 2, p. 27.

And if this had been a judgment lien, and an execution issued thereon and levied upon lands, and the levy released by and with the consent of the plaintiff in the execution, the lien would be gone, at least as to third parties who acquired title during the suspension. *Freeman on Executions*, sec. 271; *Freeman on Judgments*, sec. 379; *Au Sable River Boom v. Sanborn*, 36 Mich. 358; *Waters et al. v. Simpson et al.* 2 Gilm. 574.

Mr. THOMAS J. LAYMAN, and MESSRS. HANMACK & DAVIS, for the appellees:

The statute making the bond a lien was to secure public rights, and it seems clear that the legislature, by using the same language in making the bond a lien, intended to give to the public at least as many rights as they gave to individuals under the statute making judgments a lien. Real estate acquired by a judgment debtor after the rendition of a judgment, becomes subject to the statutory lien of the judgment. *Curtis v. Root*, 28 Ill. 367; *Wales et al. v. Bogue*, 31 id. 367;

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Root v. Curtis, 38 id. 192; *Freeman on Judgments*, sec. 367, and notes.

The statutory lien of a judgment binds all lands owned by the sureties at or subsequent to the execution of the bond, though alienated before the judgment of affirmance is pronounced. *Freeman on Judgments*, sec. 376; *Berry v. Shuller*, 25 Texas, (supp.) p. 140.

The lien attached the moment Hoge acquired title to the lands. *Freeman on Judgments*, sec. 368; *Moody v. Harper*, 25 Miss. 484.

Where a surety in an appeal bond, on the judgment being affirmed, pays the judgment, he is entitled to be substituted to the rights of the creditor, in respect to the lien of his judgment. *McClung v. Bierne*, 10 Leigh, 394.

It is generally conceded that the lien of a mortgage is not impaired by taking another bond or note for the debt, or extending the time of payment. *Taft v. Boyd*, 13 Allen, 84; *Chase v. Abbott*, 20 Iowa, 54; *Bailey v. Myrick*, 50 Maine, 171.

This is true even when the new securities bear the name of a third person as maker, obligor or indorser. 2 Am. Leading Cases, 376 (5th ed.) The rule was laid down in *Pomeroy v. Rice*, 16 Pick. 22, and *Fowler v. Buck*, 23 id. 239. A mortgage will remain in force as long as the debt or obligation which it was intended to secure, subsists, notwithstanding any formal change. *Cessna v. Haines*, 18 Ind. 496; *Williams v. Kerr*, 6 Wis. 534; *Parkhurst v. Cummings*, 56 Maine, 155; *The Bank v. Friend*, 3 Barb. Ch. 393; *Dunham v. Day*, 15 Johns. 555; *Bolles v. Chauncey*, 8 Conn. 389; *Pond v. Clark*, 14 id. 334; *Bosswell v. Goodman*, 31 id. 74; *Gault v. McGrath*, 8 Casey, 392; *Fowler et al. v. Elwood*, 66 Ill. 438.

Where land which is subject to the lien of a mortgage or other paramount incumbrance, is sold in parcels successively to different persons, the buyers are *prima facie* chargeable in the inverse order of alienation. *James v. Hubbard*, 1 Paige,

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228; *Gouverneur v. Freyer*, 4 Iowa, 47; *Guion v. Knapp*, 6 id. 35; *Patty v. Pease*, 8 id. 279; *Skeel v. Spaker*, id. 182; *Chapman v. West*, 17 N. Y. 125; *Jones v. Myrick*, 8 Grattan, 179; *Cooper v. Bigley*, 13 Mich. 463; *The Howard Ins. Co. v. Halsey*, 4 Selden, 271; *Nackin v. Stanley*, 10 S. & R. 450; *Paxton v. Harrier*, 1 Jones, 312; *Hunt v. Mansfield*, 31 Conn. 478; *Thompson v. Murray*, 3 Hill's Ch. 204.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The evidence sustains the averments of fact in the bill. There is no dispute about the facts. The controversy is as to the legal conclusion from the facts.

Touching the lien of the collector's bond, the provision of the statute is: "Said bond, when approved and recorded, shall be a lien against the real estate of the collector, until he shall have complied with the conditions thereof." Rev. Stat. 1874, p. 882, sec. 166.

The point is made, that this lien given by the statute does not extend to after-acquired lands. The words of the statute give the lien against the real estate of the collector generally, without restriction as to the time of its acquirement, and we see no reason for imposing any by construction. There is no essential difference in this respect between the language of the statute giving the lien of the collector's bond, and that making a judgment a lien upon real estate; and it has ever been held in this State, that the real estate acquired by a judgment debtor after the rendition of the judgment, becomes subject to the statutory lien of the judgment. *Curtis v. Root*, 28 Ill. 367; *Wales v. Bogue*, 31 id. 464; *Root v. Curtis*, 38 id. 192; and see Freeman on Judgments, sec. 367, and note. We perceive no reason why the same rule of construction of the statute in this respect should not be applied to both these liens.

It is said that the sureties of Hoge accepted another indemnity than this lien, and that they have never accounted

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for part of it, and that they thereby waived their rights to subrogation. All the foundation for this is, that Hoge made a mortgage to Mooneyham, one of the sureties, of 108 acres of land, for his indemnification as surety; that Mooneyham afterward released 20 acres of the land, and foreclosed the mortgage on the remaining 88 acres, and conveyed to the complainants, in pursuance of a decree of court to that effect, fifteen-sixteenths of this land acquired by the foreclosure. As to the release of the 20 acres, it simply appears the release was made without notice to the sureties of any interest or equity of the defendants, so as to preclude Mooneyham from dealing freely with Hoge, and releasing to him this 20 acres, without in any way impairing otherwise their rights as sureties against him. If defendants had any equitable claim that this 20 acres should be continued subject to the mortgage for the protection of their own interest, they should have given notice of such claim, in order to raise any ground of complaint against the sureties that the making of the release was prejudicial to the defendants. The full value of the 88 acres was allowed against complainants, in reduction of the amount of the decree.

As to the rents and profits for the four years Mooneyham previously had possession of the land, he testifies that the rental value was about \$60 per year, with taxes and repairs to come out of it; that at the time he conveyed to his co-sureties he had never paid them anything, and then settled with them; that there was then \$35 or \$40 in his hands due them, after deducting taxes, and for repairs, and foreclosing the mortgage, and they allowed him that for his trouble. There was no evidence to show that this was not a proper accounting and settlement.

We do not find that there is any just ground of complaint with the defendants in respect to this mortgage taken by the sureties. Obviously, the taking of it was no waiver of any right of subrogation.

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It appears in the case, that in October, 1868, some \$5000 of the revenue collected was stolen from Hoge, and on March 31, 1869, (Session Laws 1869, p. 336,) the legislature passed an act extending the time to Hoge to pay the State revenue until January 1, 1871, on condition his sureties should sign and file with the Auditor a stipulation agreeing to such extension, and that it should not work a release or affect their liability as sureties; which stipulation was accordingly signed by them, and filed with the Auditor, April 16, 1869. This, it is contended, destroyed the right of subrogation in this case.

When this collector's bond was made, the law required Hoge to pay over all the revenue by June 30, 1868. It is said the State, by this extension of time to Hoge, released and discharged all his sureties who did not agree to the extension; (*Davis v. People*, 1 Gilm. 409; *People v. McHatton*, 2 Gilm. 638;) that the lands in question, if subject to this lien, being then in the hands of innocent purchasers for full value, occupied the position of securities for Hoge, and therefore the extension of time to him, without the consent of the owners of the lands, discharged the lands from such lien; and authorities are cited to the effect that where property is subject to answer for the debt of another person, it stands in the position of a surety, and any dealing with the principal debtor which would have discharged a surety for the debt, will discharge the property held as security for such debt. *Rowan v. Sharp's Rifle Mfg. Co.* 33 Conn. 1; *Barnes v. Mott*, 64 N. Y. 397.

Assuming the correctness of this doctrine, and its applicability to the facts of the present case, the same answer of want of notice may be made as was with regard to the release of a portion of the property mortgaged to the sureties, and the same remarks upon that subject may be repeated here. The legislature in extending the time of payment, knew only the principal and sureties in the

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bond as concerned therein, and dealt regardfully of all interests that it had knowledge might be affected, passing the act only upon condition of its being assented to by the collector's sureties. Had it known of the existence of adverse interest on the part of these defendants, it might not have granted the extension without their like consent also; but not having or being chargeable with notice of any such interest, it could not be expected to act with any view to the protection thereof, and for not having done so the State should not be held responsible, and made to lose the remedy of a lien upon these lands, because of the supposed prejudicial effect to their owners resulting from the extension of the time of payment of the State revenue; and the same is to be said with respect to the sureties, and their consent to the extension. We regard the case in this respect as covered by the principle of the decision in *Matteson v. Thomas*, 41 Ill. 110, and *Iglehart v. Crane & Wesson*, 42 Ill. 261, that before a prior mortgagee can be required to shape his action in the collection of his debt, in reference to the subsequent order of alienation of different parcels of the mortgaged premises, he must have actual notice of what that order is, and not merely the constructive notice derived from the registry of the deeds made by the mortgagor subsequent to the mortgage,—that such registry is not constructive notice to him.

As the original bill filed January 8, 1876, did not show that the sureties had paid anything upon the judgment recovered in the Supreme Court in favor of the State, and it was the supplemental bill filed October 31, 1876, which showed the payment by the sureties of this judgment on July 24, 1876, being more than six months after the original bill was filed, it is insisted the complainants were entitled to no relief whatever in respect to this judgment; that the hearing of a chancery cause can be had only on the grounds which existed when the original bill was filed. We do not conceive that it was only payment of the judgment by the sureties which

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gave them title to relief in respect to it. It has been held that a surety for a debt secured by mortgage may, even before he has been injured, compel payment from the land in the first instance. 1 Hilliard on Mortgages, 338; and see *King v. Baldwin*, 2 Johns. Ch. 554; 4 id. 122.

The original bill showed the recovery of the judgment in the Supreme Court in favor of the State, and prayed that enough of the lands to pay that judgment be declared subject thereto, and be sold to pay the same, which form of relief complainants were entitled to without payment of the judgment, agreeably with the last above authorities. The supplemental bill showed the payment by the sureties of the judgment since the commencement of the suit, and prayed that complainants be subrogated to the rights of the State, and that the lands be sold to pay the sureties the amount they had paid on the judgment. The relief prayed for by the original and supplemental bills, and which complainants were entitled to under them, was substantially the same, as it accomplished the same end. There is nothing in this point.

It is insisted that the court erred in ordering a sale of the lands in the inverse order of their alienation by Hoge. It is admitted by appellants that this would have been the just and proper mode of sale had Hoge owned all these lands when the bond was made; but as he at that time owned but two of the tracts, and afterwards acquired title to the other tracts, it is insisted that the reason of the rule can have no application to the facts in this case; that when Hoge conveyed the tracts he owned when the bond was made, it could not be said, as to the grantees, that the liability of Hoge on this bond was thereby primarily cast upon the lands to which Hoge at that time had no title, and subsequently acquired. It is claimed that the lien, if any, attached to the subsequently purchased tracts in the same order of time in which Hoge acquired title to them, and that they thus stand in the nature of so many successive mortgages or securities for

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Hoge, and therefore the payment of Hoge's debt from them should be enforced in the same order of time in which they severally became subject to such payment,—that the party whose property was last pledged for the default of Hoge should have the benefit of all prior liens and securities which the State and county could have enforced. We perceive no difference for the application of the rule where the lands are all held at the time the lien attaches, and where part or all of them are acquired subsequently. As to the two tracts held here when the bond was made, upon the sale of one of them by Hoge the lien rested primarily upon the tract which he retained, and that should first have been sold for the discharge of the debt. The equity would depend on the purchaser's right to have so much of the land as he had bought, free from incumbrance, and on the duty of the creditor, who had two funds open to him, to take that which would not prejudice the purchaser. After Hoge had sold both these tracts owned by him when the bond was made, and he had purchased the first tract he acquired after the making of the bond, the very same equity as in the other case would now exist with respect to this tract while in Hoge's hands, and it should first be sold under the lien, before having recourse to the two tracts which he had previously sold, and which he owned when the bond was made, and the purchaser of this last tract from Hoge would take it with the same equity resting upon it as when in Hoge's hands. Hoge would convey no better right than he possessed himself. The same may be said with respect to each subsequent parcel of land which Hoge acquired. We think the order of sale prescribed was proper, and in accordance with the well settled rule.

There is a claim of homestead right set up against the lien of this bond, with respect to the tracts of land acquired after the making of the bond, which we think must avail, at least to a certain extent.

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It appears from the evidence, that on October 27, 1868, Hoge purchased a house and some two acres of land, and at once moved into the house with his family, and occupied it as a homestead until he exchanged it with one Charles Hook. The property was shown to be worth not exceeding \$800. A judgment creates no lien against a homestead where it is of less value than \$1000. Hoge had a clear homestead right in this last named property, and it being of less value than \$1000, it was not subject to the lien of the bond, and should not have been decreed to be sold. *Green v. Marks*, 25 Ill. 221; *Bliss v. Clark*, 39 id. 590; *Fishback v. Lane*, 36 id. 437; *Hartwell v. McDonald*, 69 id. 293.

On December 21, 1868, Hoge and Charles Hook exchanged lands, Hoge conveying by warranty deed this house and two acres, and 28 acres elsewhere, to Hook, for which Hook conveyed to Hoge 120 acres of land, and paid him \$1000. Soon after, in January or February, Hoge moved on this 120 acres, and occupied it with his family as a homestead until he exchanged it with one Britton. On February 19, 1869, Hoge and Britton exchanged farms, Hoge conveying by warranty deed this 120 acres which he got from Hook, to Britton, for another 120 acres, which Britton conveyed to Hoge. Hoge then moved on this 120 acres got from Britton, and occupied it with his family as a homestead until he conveyed the same to Cantrell, August 24, 1869.

Although a short space of time did intervene after acquiring the title to these several tracts of land by Hoge, before he entered into the occupancy of them as a homestead, yet as he evidently acquired them for a homestead, and within a reasonable time thereafter did move on them and occupy them as a homestead, we think the premises, respectively, at the time of acquiring title, should be considered as becoming the homestead, so that because of their being such the lien of the bond did not attach thereto. As, however, we do not discover in the record any evidence as to the value, while in

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the hands of Hoge, of the two tracts of 120 acres each, severally acquired from Hook and Britton, we can not say whether or not they were wholly exempt from the lien. They would be so in case they did not exceed in value, severally, \$1000, but if they exceeded that sum in value then they would be exempt to the extent of \$1000, and the excess above that would be subject to the lien.

It is objected to considering the homestead right in this case that it is not set up in the answer, and that so there is no averment in the pleadings to afford a foundation for admitting evidence of a homestead right. The bill avers that the bond was a lien upon the lands. The answers deny that the bond ever was a lien upon the lands. Under the issue formed upon this averment and denial, the evidence of a homestead right was competent. It went to show that the bond never was a lien upon the lands,—that they were exempt from the lien so that it never attached to them, and we think the evidence was admissible in disproof of the lien having ever attached, under the general denial that it ever attached, without the answer having set forth specifically the facts showing why the bond never did become a lien.

As to the three tracts of land acquired by Hoge after the making of the bond, as the first was exchanged for the second, and the second for the third, it is contended that if there be found to be a lien, the right of subrogation should be held to exist only in respect to some one of these three tracts,—that to allow it as to all three would be making the same property virtually answer three times for the debt. It is said subrogation is an equitable principle, and that as all the present holders of these three tracts are innocent purchasers for full value, and have made large and valuable improvements thereon, upon consideration of all the equities of the several parties, complainants should, in equitable right, be subrogated but to one only of these tracts. In respect of this last contention, the views of a majority of the court, in which Mr.

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Justice SCOTT and the writer of this opinion do not concur, are as follows :

As regards the second and third of these tracts, there was nothing but a mere exchange of one tract for the other. Hoge exchanged with Britton one tract of 120 acres of land for another tract of 120 acres. The last tract would seem to be but a substitute for the other, and to charge both with the lien would look much like subjecting virtually the same property twice.

In respect of dower when a valid exchange of lands is made, and the title is consummated by entry, the widow of either of the parties to the exchange may, by the common law, exercise the right of election as to which estate she will be endowed of,—whether that given, or that received in exchange by her husband; but she can not have dower in both, although the husband had seizin of both during the coverture. 1 Scribner on Dower, 271. Further on, however, the author says: "The doctrine of the common law with respect to exchanges of real property is not universally adopted in the United States. The rule in a majority of the States is, that this mode of dealing in lands stands upon the same footing as transfers in the usual form. Both parties are regarded as ordinary purchasers, and the right of dower of the wife of each attaches as well upon the parcel conveyed as upon that received in exchange." By our statute the right of dower is limited, upon the exchange of lands, as at common law, and the statute providing that if the election by the widow be not made within one year after the death of the husband, it shall be deemed to have been made to take dower in the lands received in exchange. Rev. Stat. 1874, p. 425, sec. 17.

The question is not how it might be at law were the judgment creditors seeking to enforce their lien under the bond. They have been satisfied their debts, and the inquiry is as to the equitable right of subrogation which the sureties in the bond have. Without, then, saying how it might be at law

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in the allowance of this right of subrogation, which is governed by equitable principles, the majority of the court are inclined, in view of all the equitable considerations with respect to others who are to be affected by the exercise of the right, to adopt, by analogy, the rule applied where dower is concerned, and hold that, equitably, complainants should be subrogated as to one, only, of these two tracts,—and that will be the one last acquired from Britton, as that was the last in the order of alienation by Hoge, and so first to be sold under the decree, which precludes an exercise of election by complainants as to which one of the tracts the lien shall attach. The operation, then, will be to deny subrogation in respect to the lot acquired by Hoge from Hook, and not hold it bound by the lien, or subject to be sold.

This principle we do not find it practicable to apply with respect to the first exchange. That was not, as in the second case, the mere exchange of one tract for another, but a house and two acres of land, the homestead of Hoge, and not subject to the lien, together with 28 acres of land, were exchanged with Hook for 120 acres of land and \$1000. This was not an exchange proper, in the legal sense. We do not see but that that 28 acres is subject to the lien.

Appellees have filed in the case, in this court, a suggestion of certain minor errors in the decree in ordering the whole of certain parcels to be sold, instead of a specified fractional portion thereof, which amounts to a confession of errors in such respect. In this respect, of course, the decree is adjudged erroneous.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion. It may be open to the parties to take further proof, if desired, as to the value of the 120-acre tract acquired by Hoge from Britton, at the time it was held by Hoge, with reference to the homestead question of its being of more than the value of \$1000 or not.

Decree reversed.

Syllabus.

ADALINE DARLING *et al.*

v.

PETER McDONALD.

Filed at Mt. Vernon January 18, 1882.

1. JURISDICTION of circuit court—*suit at law against executors.* The circuit court has; under sec. 12, art. 6, of the constitution, jurisdiction of an action of assumpsit brought against the executors of an estate upon a claim which had accrued against the testator, and this jurisdiction is unaffected by the statute conferring jurisdiction upon the county court in the same class of cases.

2. ADMINISTRATION OF ESTATES—*two years' limitation interposed—of the proper judgment.* In a suit against the representatives of an estate of a deceased person, when the defence is successfully interposed that the suit was not commenced, or the claim was not exhibited, within two years after the grant of administration, the judgment must be special, and payable out of assets thereafter to be inventoried, corresponding to the common law judgment of *quando acciderint*.

3. Such a judgment does not imply assets for the satisfaction of the debt. The presumption at the end of two years from the grant of administration is, that the personal estate has been fully inventoried, or accounted for, by the executor or administrator.

4. SAME—*of a judgment payable "in due course of administration"—out of what assets to be satisfied.* A judgment of the circuit court against executors, to be paid in the due course of administration, is not limited to subsequently discovered or inventoried assets for payment, but is to be paid out of assets administered in the manner and order that other debts of like dignity are to be paid. Such a judgment binds the assets in the hands of the administrator, and it is the duty of the executors to pay it without further notice or demand, the statute fixing its grade or class.

5. SAME—*classification of claims by circuit court, after rendering judgment.* The circuit court, after rendering judgment against executors, to be paid in the due course of administration, has full power, as an incident to its jurisdiction, to pronounce the judgment, afterwards to direct its classification, the same as the county court may do on the allowance of a claim, and order that the record be certified to the county court; and that court, having power to enforce the settlement of the estate, has the power, and it is its duty, to include in such settlement the payment of such judgment.

6. SAME—*effect of judgment in the circuit court—and as to the presentation of claims to the county court.* A judgment against executors in a suit brought in the circuit court, sustains the same relation to the assets of

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136 256101 370
142 40840a 178
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154 223101 370
159 37101 370
158 350101 370
57a 163101 370
166 128101 370
80a 617101 370
82a 296101 370
191 *862

191 *868

101 370
208 *412

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the estate as a judgment in the county court. Such a judgment is not subject to the revision of the county court, but it must enforce its payment the same as a claim allowed in that court.

7. The claims required to be presented to the county court at the term fixed upon for the adjustment of claims against an estate, are those which have not been liquidated or established, and upon which it is necessary to hear evidence, and not those which have been reduced to judgment binding upon the executors or administrators.

8. Section 61 of the act concerning the administration of estates, in regard to bringing suits against the executor or administrator of an estate in the county court, does not require suits to be brought on a judgment of another court already binding the executor or administrator, but relates to claims not established as a legal charge against the estate, and upon which there is to be a regular trial as in any other causes at law.

9. *SAME—proof in the county court of the judgments of other courts—as to the mode.* A judgment regularly obtained against the personal representatives of a deceased person is duly proven to the county court, under sec. 65 of chap. 3, Rev. Stat., by a copy thereof, duly certified. Such certified copy shows it to be a legal claim against the estate to the extent it purports. This section has nothing to do with taking judgments against estates, but is simply confined to declaring a rule of evidence in regard to judgments already obtained against estates.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Richland county; the Hon. WILLIAM C. JONES, Judge, presiding.

Andrew Darling, in and by his last will and testament, appointed Adaline Darling, Robert Byers, and Samuel C. Clubb, to be executors of the same. After his death, and on the 28th day of April, A. D. 1874, letters testamentary, in due form of law, were thereupon granted to them by the county court of Richland county, and they then duly qualified as such, and entered upon the administration of the estate. Shortly thereafter Peter McDonald commenced an action of assumpsit, in the Richland circuit court, against said executors, in their capacity as such, for services rendered their testator in nursing, in his last illness, etc. Having been properly summoned, they appeared and plead to the action,

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and the cause was tried at the November term, 1874, of that court, and resulted in a judgment in favor of McDonald, and against the executors, for \$6420. The executors prosecuted an appeal from that judgment to this court, and the same was, by the judgment of this court, reversed, and the cause remanded. (See *Darling et al. v. McDonald*, 77 Ill. 520.) At the November term, 1875, of the Richland circuit court, the cause was again tried in that court, and this time resulted in a judgment in favor of McDonald and against the executors, for \$7640, to be paid in due course of administration. An appeal was also prosecuted by the executors, from this judgment, to this court, but on hearing it was, in all things, affirmed by this court. Subsequently, on petition of the executors, a rehearing was ordered, and thereafter, at our June term, 1879, on full consideration of the cause, we adjudged again that the judgment of the Richland circuit court should, in all things, be affirmed.

At the November term, 1878, of the Richland circuit court, which was after the affirmance of said last judgment, and before the granting of a rehearing in the cause, an order was entered directing the executors to pay the judgment as a 7th class claim, and ordering a copy of its record to be certified to the county court. In January, 1879, notice was served upon the executors that the clerk of the circuit court had filed in the county court copies of said judgment and orders, and that McDonald would ask the county court to enter the judgment as duly proven, and for other purposes. At the same term of the Richland county court, and after the service of this notice, McDonald presented his petition to that court, praying that court to enter of record said judgment as a claim against the estate of the testator, duly proven, and that the executors pay it out of the general assets. The county court refused to grant the prayer of this petition, and to make such order, and from this refusal McDonald appealed to the circuit court of Richland county. On hearing this appeal the circuit

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court of Richland county, at its November term, 1879, granted the prayer of McDonald's petition, and ordered that the judgment be paid as a 7th class claim against the testator's estate. At the December term, 1879, of the Richland county court, a transcript of the judgment and orders of the circuit court of that county in the case was presented, and that court was asked to register said judgment. This motion was resisted by the executors. The court took the matter under advisement until its January term, 1880, and then proceeded to render judgment on said transcript, classifying the same as a 7th class claim, and directing its payment in due course of administration.

The executors prayed an appeal from this judgment and order to the circuit court, but did not perfect the same. Upon an amended report filed by the executors, the county court proceeded to ascertain the whole amount of moneys and assets belonging to the estate, which had come into the hands of the executors, and the whole amount of debts established against said estate, and thereupon made an order directing the executors to pay to appellee his judgment within thirty days. The executors appealed from this order to the circuit court of Richland county, which court, by its judgment rendered at its April term, 1881, affirmed the same. The executors then appealed from that judgment to the Appellate Court for the Fourth District, and that court having by its judgment affirmed the same, the present appeal is prosecuted.

Messrs. BELL & GREEN, for the appellants.

Messrs. WILSON & HUTCHINSON, and Mr. J. P. ROBINSON, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The order from which this appeal is prosecuted directs the payment of a judgment rendered by the circuit court of

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Richland county, in favor of McDonald and against Darling's executors, in an action of assumpsit, for the personal services of McDonald in nursing Darling during his last sickness. Beyond all question this was a "cause in law," and being such, the court had original jurisdiction in "the cause" under sec. 12, art. 6, of the constitution; and this jurisdiction is unaffected by the statute conferring jurisdiction upon the county court in the same class of "causes." *Myers v. The People*, 67 Ill. 503; *Mapes v. The People*, 69 id. 525; *Burns v. Henderson*, 20 id. 264. All necessary parties were legally before the court, and the court having thus had jurisdiction of the persons and the subject matter, its judgment is now *res judicata*. *Smith v. Brittenham*, 94 Ill. 624; *Chicago and Alton R. R. Co. v. The People ex rel.* 72 id. 82; *Rising et ux. v. Carr*, 70 id. 596; *Campbell v. Rankin*, 99 U. S. (9 Otto,) 26.

The judgment is, that the amount recovered is "to be paid in due course of administration." Where the defence is successfully interposed that suit was not commenced, or the claim was not exhibited, within two years after the grant of letters of administration, the judgment must be special, and payable out of assets to be thereafter inventoried, corresponding to the common law judgment of *quando acciderint*. *Thorn v. Watson*, 5 Gilm. 26; *Judy v. Kelley*, 11 Ill. 211; *Peacock v. Haven, Admr.* 22 id. 23; *Russell v. Hubbard*, 59 id. 335; *Shepard, etc. v. National Bank, etc.* 67 id. 292. "Such a judgment does not imply assets for the satisfaction of the debt. The presumption at the end of two years from the grant of administration is, that the personal estate has been fully inventoried, or accounted for, by the executor or administrator." *Ryan v. Jones*, 15 Ill. 6.

At common law, a judgment against an executor or administrator which was entitled to be satisfied out of the assets administered (*de bonis testatoris*), was for the debt, or damages and costs, "to be levied of the goods of the testator or

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intestate in the hands of the executor or administrator to be administered." 2 Tidd's Practice (3d Am. ed.) 112, *113; 2 Williams on Executors, (3d Am. ed.) 1685, *1687; and 1691, *1692. At an early day, however, this court held that it was error to award execution in such a judgment. The reason controlling was, that all the creditors of the estate are entitled to rely upon administration and distribution of the estate in the mode provided by the statute, for the payment of their debts. *Greenwood v. Spiller*, 2 Scam. 502, and *Welch v. Wallace*, 3 Gilm. 490. In the last named case this court corrected the form of the judgment, and made it conclude, "to be paid in due course of administration." See, also, *Judy v. Kelley*, *supra*.

In *Greene, Admr. etc. v. Grimshaw*, 11 Ill. 389, a judgment against an administrator, not awarding execution, but expressed "to be levied of the goods and chattels, etc., in the hands of the administrator to be administered," (as in the common law form of a judgment *de bonis testatoris*, *supra*), was held to be sufficient as establishing a demand against the estate which the administrator was required to pay in due course of administration.

In *Ryan v. Jones*, *supra*, it was said: "Where the two years' limitation is not successfully interposed by the administrator, the judgment against him is for the amount of the plaintiff's debt, to be paid in the due course of administration."

In *Wells v. Miller*, 45 Ill. 33, the defence was, the general issue, and notice thereunder that the claim was not presented within two years after the grant of letters of administration. The judgment of the lower court was, that the plaintiff recover the amount of his claim, "to be satisfied out of such estate or assets of said J. C. Miller [the intestate] as may be or may have been discovered, after two years from the grant of letters of administration on said estate, not inventoried or accounted for." This court found, as a fact, that

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the claim had been properly exhibited within two years from the grant of letters of administration, and therefore reversed that judgment, and directed that judgment be entered, "to be paid in due course of administration."

And in *People, use, etc. v. Gray*, 72 Ill. 343, it was held: "Where a judgment rendered by a county court for the payment, in due course of administration, of a claim exhibited against an estate, does not provide for its payment from assets of the estate not then inventoried, the presumption is the claim was exhibited within two years from the time of granting letters of administration."

It is, therefore, clear, under the authority of these decisions, that this judgment is not limited to future discovered or inventoried assets for payment, but is entitled to be paid out of the assets administered. Indeed, the language of the judgment, apart from the decisions, would seem to clearly show this. It implies the administration is not completed, and that payment is to be made in the course or order of administration,—that is, in the manner and order that other debts of like dignity are to be paid. Nothing therefore remained for the executors to do but to obey the command of that judgment,—pay the amount in due course of administration.

But the objection is raised, that under the statute the executors were authorized to pay no claim out of the assets administered, unless it had been presented to and allowed by the county court at the term thereof fixed upon by the executors for the adjustment of claims against the estate, or the same had been filed with the clerk of the county court, and summons been thereupon issued within two years from the grant of letters testamentary, etc. It is a sufficient answer to this, that the circuit court of Richland county, a court of competent jurisdiction, has adjudged otherwise, and ordered the claim, as it is, to be paid in due course of administration, and this court has affirmed that judgment. However

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erroneous it may have been, the cause of action thereafter ceased to be the subject of litigation, and it could no longer be questioned whether the court was authorized to render the judgment as it did. This judgment bound the assets in the hands of the executors. *Gold, Admr. v. Bailey*, 44 Ill. 491. But we have seen they could not be seized and sold on execution, nor under the judgment rendered could McDonald be postponed to future discovered and inventoried assets, and so all that remained was for the executors to pay, as was ordered, "in due course of administration." The statute itself fixes the class to which the claim belongs, and hence, "due course of administration" means that it shall be paid as, and *pro rata* with, other claims of that class, out of the assets administered. The power of the county court to enforce settlement of the estate, and hence to make the order appealed from, is ample under the statute. Rev. Stat. 1874, chap. 3, secs. 111, 112, 113, 114. And since the executors were parties to the judgment, they needed no further notice of its existence. It was their duty to pay it without further notice or demand. But it is unnecessary to rest the affirmance of the order of the county court exclusively upon this ground.

The circuit court having original jurisdiction, unaffected by the statute conferring jurisdiction upon the county court, in the "cause in law," it necessarily follows that it had power to render a judgment therein binding upon the parties, and power to enforce a judgment follows, also, as a necessary incident to the power to render the judgment; but power is expressly conferred upon circuit courts by sec. 26, chap. 37, Rev. Stat. 1874, to "make and award such judgments, decrees, orders and injunctions, and to issue all such writs and process as may be necessary or proper to carry into effect the powers granted to them."

Clearly, then, the circuit court had power, after having rendered judgment "to be paid in due course of administra-

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tion," to direct its classification as a 7th class claim, in analogy to and in order to harmonize with the statute relating to the allowance of claims and rendering of judgments against estates in county courts, and that the record be certified to the county court; and the county court having power to enforce settlements of estates generally, necessarily had power, and it was its duty, (for otherwise the estate could not be settled), to include in such settlement payment of this judgment.

It is quite true that the present statute, in providing for the classification of claims against estates, fixing the period of limitation for exhibiting or suing upon such claims, and the mode of obtaining judgment thereon, speaks only of the county courts; but the manifest purpose and design of the statute was to provide a complete system for the administration and settlement of estates, and this, obviously, can not be the effect of the statute if judgments in the circuit courts are to sustain a different relation with reference to the assets of the estate, from that sustained by judgments in the county courts, and be enforced without regard to that statute. Such a construction would necessarily defeat the chief beneficial results that would otherwise flow from the statute.

Since the circuit court is of general original jurisdiction, and an appeal is expressly allowed to it from all orders and judgments of the county court, it can not be presumed its judgments were to be submitted to the revision of the county court.

The claims required to be presented by sec. 60, chap. 3, at the term of the county court fixed upon for the adjustment of claims against the estate, are those which have not been liquidated or established, and upon which it is necessary to hear evidence, and not those that have been reduced to judgment, binding upon the executors or administrators. This, the language of that section shows beyond all controversy, for it provides for the introduction of evidence, if the

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claim be not admitted, and trial by jury, and requires the claim, in any event, to be sustained by the sworn evidence of the claimant that it is just and unpaid, and an order of the county court allowing it (in the nature of a judgment) must then be entered before it becomes a charge upon the estate; and the same may be said in regard to bringing suit against the executor or administrator, under the next section,—the 61st. Such suits are not to be brought on a judgment already binding the executor or administrator, but on a claim not established as a legal charge against the estate, and upon which there is to be a regular trial, as in any other cause in law, and a judgment of the court rendered.

The statute, however, expressly recognizes the right of the circuit court to proceed to trial and render judgments against executors and administrators. Thus, in secs. 11, 12, 13 and 18, of chap. 1, title "Abatement," Rev. Stat. 1874, it is provided, where the defendant dies before trial, and while the suit is pending, the suit shall not abate, but the administrator or executor shall be made defendant, and judgment shall be rendered against him. This, of course, implies that the cause of action is one that does not die with the defendant and that constitutes a valid charge against his estate. By sec. 123, of chap. 3, it is provided, that "in addition to the actions which survive at common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property, or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance, or non-feasance of themselves or their deputies, and all actions for fraud or deceit." So in regard to garnishment, it is provided by sec. 18, chap. 62, Rev. Stat. 1874: "In case of the death of a person served as garnishee, his executors or administrators may be made a party, and notified, unless his appearance is entered, as in case of the death of a defendant, and the

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cause may proceed against him as personal representative of the deceased." So, also, in case of attachments in circuit courts, sec. 3, of chap. 11, Rev. Stat. 1874, provides: "Heirs, executors and administrators of deceased defendants shall be subject to the provisions of this act, in all cases in which it may be applicable to them."

Now, in all these cases, and perhaps in others, it is clearly contemplated judgment shall be rendered against executors and administrators, to be paid out of the assets administered, in due course of administration,—and in such of them as are for the recovery of punitive or exemplary damages, it would be impossible, in advance of judgment, to file a definite statement of the amount, in the county court; yet there is no more mention made or notice taken of such judgments in secs. 60 and 61, *supra*, than there is of judgments rendered by the circuit court in cases originally commenced against executors or administrators in that court. In such cases it is plain to every mind the claims are not unadjusted, as are the claims contemplated by those sections, but they are adjusted,—their validity is established beyond controversy, and they are made fixed charges against the assets administered; and it is simply nonsensical to say that their validity remains to be fixed by any judgment to be passed upon them by the county court.

It is provided by sec. 65 of chap. 3, *supra*, that "a judgment regularly obtained, or a copy thereof duly certified and filed with the court, shall be taken as duly proven." This is not free from obscurity, but still, we think its meaning is apparent. Of course, it has no reference to judgments to be obtained in the county court, for section 61 governs them, and they can need no production or proof; but in discharging the duty of causing settlement to be made of the estate, it is necessary that the county court should be advised of the existence, and in some way have before it evidence of the nature and amount, of all the judgments against the executor

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or administrator which bind the estate, otherwise it could never know whether the estate was settled or not, and could not intelligently pass upon the accounts of the executor or administrator. Hence the judgment itself, or a copy thereof, is made evidence that "it is duly proven," and so is a legal claim, to the extent it purports, against the estate. It will be observed, this section has nothing to do with allowing claims or taking judgments against estates, but is simply confined to declaring a rule of evidence in regard to judgments already obtained against estates.

The county court being thus required to recognize the present judgment as duly proven, had, in our opinion, no power to deny the force and effect it had as a judgment of the circuit court. Other claims of like character, though allowed by the county court, could therefore have no priority over it,—it could not be postponed; and so it follows that all that was possible was either to pay it prior and in preference to other claims, or *pro rata* with them, and in either view the order of payment is right; but although it is not within the letter of the statute to classify it with claims allowed by the county court, it is within the clear and manifest spirit and purpose of the statute to do so. Beyond all question, as a judgment of the circuit court it is entitled to payment in the "due course of administration,"—it is the duty of the county court, in causing settlement of the estate, to enforce its payment,—and that court has no authority, in doing so, to impair the force and effect of the judgment as a judgment of the circuit court. It should be treated, as it was by the county court, just like a judgment of that court in a suit commenced under the provisions of section 61, by summons, and classified and paid, in the settlement of the estate, as such a judgment would be entitled to be classified and paid.

The judgment is affirmed.

Judgment affirmed.

Syllabus. Brief for the Plaintiffs in Error.

MOSE WILLIAMS *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Mt. Vernon January 18, 1882.

1. CRIMINAL LAW—*of the indictment—for receiving stolen goods.* An indictment for receiving stolen goods for gain, etc., should describe the goods with accuracy, and a variance in this particular will be fatal.

2. SAME—*proof must sustain every material allegation.* It is an elementary principle that every material fact essential to the commission of a crime must be distinctly alleged and clearly proven on the trial in order to warrant a conviction.

3. SAME—*on charge of receiving stolen money, a larceny of the money must be shown.* It is absolutely essential to a conviction for having received stolen money for gain, knowing it to have been stolen, that the prosecution should prove, beyond a reasonable doubt, that a larceny of the money had been committed. This fact, being the *corpus delicti*, can not be established alone by the confession of the accused.

4. SAME—*sufficiency of proof in the particular case.* A charge in an indictment that the defendants, "for their own gain, knowingly and feloniously received one gold coin of the value of \$10, one bill, purporting to be issued by the Monmouth National Bank, of the value of \$10, and one bill, purporting to be issued by some National bank, of the value of \$5," knowing them to have been stolen, is not sustained by the testimony of a witness that he found on one of the defendants \$10, and on the other \$15 and some small change, as it does not show it was of the kind and character of money described in the indictment.

WRIT OF ERROR to the Circuit Court of Randolph county;
the Hon. AMOS WATTS, Judge, presiding.

MESSRS. GORDON & HOOD, for the plaintiffs in error:

Confessions made through hope or fear, induced by words or acts of the party having the prisoner in custody (out of court), are not admissible. 1 Arch. Crim. Prac. and Pl. side page 127; 1 Greenleaf on Evidence, secs. 219, 220; 1 Bouvier's Dic. 4 Confession; *Miller v. The People*, 39 Ill. 457; *Gates v. The People*, 14 id. 433; *Brown v. The People*, 91 id. 506; *Hosten v. The People*, 51 id. 239.

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161	311
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162	265
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80a	43
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197	51
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Confessions should be received with caution. . 1 Arch. Crim. Prac. and Pl. 125, note 1; 1 Greenleaf on Evidence, sec. 214; 1 Bouvier's Dic. 3 Definition of Confession.

In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved, is held insufficient for a conviction. *May v. The People*, 92 Ill. 343, and cases there cited; 1 Greenleaf on Evidence, sec. 217; 4 Blackstone's Commentaries, side page 359; *Bergen v. The People*, 17 Ill. 426.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

Mose Williams and Frank Lewis were tried and found guilty at the March term, 1881, of the Randolph circuit court, before the court and a jury, upon a charge of having knowingly and feloniously received, for their own gain, certain bank bills and gold coin, well knowing the same to have been stolen, and were duly sentenced to the penitentiary, in pursuance of the verdict of the jury, for a period of eighteen months,—to reverse which conviction this writ of error is prosecuted.

A reversal is urged mainly on two grounds: First, it is urged that the conviction is not warranted by the evidence; second, that the court erred both in the giving and refusing of instructions, to the prejudice of the accused.

George Weaver testified, "that on the morning of the 11th of March he saw the defendants coming up over the barges from the boat to where he was standing, and that soon after that he again saw them standing on the levee, and went up to them and took hold of them, and told them he would have to take them on the hill, and that they broke loose from him and ran off." This witness further states that he did not tell them he was arresting them, or what he was going to take them on the hill for.

John W. Ragsdale, marshal of the city of Chester, testifies, that having gone in pursuit of the defendants, he found them

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asleep in a straw-pile near the road leading to Stone's landing; that on waking them up he asked them if they did not get off the boat at Chester, and they said they did. About this time William Reno, who was also in search of the accused, came up, and in his presence witness asked the accused how much money they had, and they said they had only a dollar. Witness then gave his revolver to Reno, and told him to guard them while he searched them. The witness says: "I found on Mose Williams \$10, and on Frank Lewis \$15, and some small change, amounting, I think, to twenty-five cents. I asked them where they got the money, and they said they had been paid off. I told them their wages would not have amounted to that, and they said they had won it. I then asked them if it was not the proceeds of a robbery on the boat, and they said it was, and that it was given them by a white man, and he told them to go along and keep their mouths shut. They admitted they had been arrested that morning in Chester. I asked them if they did not know a robbery had been committed on the boat 'Golden Dust,' and they said they had heard some of the 'grays' squealing about being robbed on the boat. I do not think Lewis said anything. They said a white man gave it to them. They saw him walking around on the deck, and they asked him what he was doing, and he told them to go along, and they went to the front of the boat, and he followed them and gave them the money, and told them to keep their mouths shut. While I was searching them, and during the conversation, Reno was sitting near by guarding them, with two revolvers in his hands. They told me to keep the money and let them go, for they did not want to go to the penitentiary. * * * I had not told them I had arrested them. Had no warrant. Williams done the talking. Lewis said nothing at all."

Reno's testimony is substantially the same as Ragsdale's. There are some slight discrepancies between them in repeating the statements of the accused, but we do not regard this

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as materially affecting the testimony of either. The foregoing is all the evidence in the case.

It must be conceded that the conduct of the accused is hardly consistent with innocence. Their leaving the boat at the early hour they did, without any apparent legitimate object in doing so, their flight, and secreting themselves in the straw-pile, and their contradictory statements with respect to how they came by the money found on their persons, are all circumstances of the most suspicious character, and leave little room, if any, to doubt that they are guilty of some crime or other; but does the evidence establish, beyond a reasonable doubt, that they committed the particular crime with which they are charged in the indictment?

Mr. Wharton, in discussing the sufficiency of an indictment for receiving stolen property, among other things says: "The indictment should describe the goods with accuracy, and a variance in this particular will be fatal." (2 Wharton on Crim. Law, sec. 1901, 7th ed.) Indeed, it is an elementary and fundamental principle that every material fact essential to the commission of a crime must be distinctly alleged and clearly proven on the trial, in order to warrant a conviction. The specific charge in this case is, that the accused, "for their own gain, knowingly and feloniously received *one gold* coin of the value of \$10, one bill, purporting to be issued by the Monmouth National Bank, of the value of \$10, and one bill, purporting to be issued by some National bank, of the value of \$5," knowing the same to have been stolen. It was clearly the duty of the pleader to give, as he did, a proper description of the stolen money alleged to have been received by the accused, otherwise they could not intelligently have prepared for trial; and as this was a material averment in the indictment, it follows the prosecutor was bound to prove it substantially as laid. This has not been done. The only evidence to be found in the record that can be regarded as having the slightest reference to this allega-

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tion in the indictment, is the statement of Ragsdale with reference to what he found on the defendants when he searched them at the straw-pile. He says: "I found on Mose Williams \$10, on Frank Lewis \$15, and some small change, amounting to, I think, twenty-five cents." There is no proof of their having received, or of having about them, a gold coin of any kind, or a National bank bill of any denomination or description. They are not, nor is either of them, so much as mentioned by any witness. It is clear that the accused might well have had the amount of money on their persons testified to by the witness, and not have had a gold coin or bank bill of any kind about them, much less the particular kinds mentioned in the indictment.

It follows, therefore, unless all authority and precedent on the subject are to be set at defiance and wholly disregarded for the purpose of punishing the accused, who are, in all probability, guilty of some crime or other, this conviction can not be sustained.

There is also another fatal objection to the conviction. There is no evidence at all, outside of the very loose, unsatisfactory and contradictory statements of one of the accused, that the money found upon their persons, even if it had been properly described in the indictment, was stolen money. To make out the offence charged in the indictment, it devolved upon the People to prove, beyond a reasonable doubt, that a larceny of the money had been committed. Upon this bottom fact the whole prosecution depended. This fact being what is known as the *corpus delicti*, could not be established alone by the confessions of the accused. This rule is fully recognized by the ablest text writers of the day and the general current of authorities. 1 Wharton on Crim. Law, sec. 745; 1 Greenleaf on Evidence, sec. 217; *May v. The People*, 92 Ill. 343.

As the judgment of the court below will have to be reversed for the reasons already stated, it is unnecessary to

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consider the exceptions taken to the instructions of the court, or other questions discussed by counsel.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings.

Judgment reversed.

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100a	49

PHILLIPPINA A. RITTER

v.

JOHN G. SCHENK *et al.*

Filed at Mt. Vernon January 18, 1882.

1. **ERROR WILL NOT ALWAYS REVERSE**—*admission of improper evidence.* An error in admitting the evidence of an incompetent witness on the hearing of a chancery case, is no ground of reversal when the record contains other evidence which is competent and sufficient to sustain the decree.

2. **CHANCERY**—*presumption that only proper evidence was considered.* In chancery cases, it will be presumed that the court disregarded incompetent evidence on the hearing, especially where there is competent evidence on which to base its decree.

3. **PAYMENT**—*presumption from possession of note by payee.* The possession of a promissory note in the hands of the personal representative of the payee, unexplained, is *prima facie* evidence that it has not been fully paid, and when it is produced in evidence, the burden of proof is on the maker to establish payment, by a preponderance of evidence.

4. **SAME**—*payment of interest after debt has been paid—effect on rights of parties.* The payment of interest on the amount claimed to be due when the note was in fact fully paid, the holder claiming compound interest, will not conclude the maker from afterwards proving a prior payment in full, where such payment of interest was made in ignorance of his rights.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Madison county; the Hon. GEORGE W. WALL, Judge, presiding.

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Mr. DAVID GILLESPIE, and Mr. WILLIAM H. JONES, for the plaintiff in error.

MESSRS. METCALF & BRADSHAW, for the defendants in error.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Phillippina A. Ritter, executrix of the estate of Henry Ritter, deceased, in the circuit court of Madison county, against John G. Schenk and Anna Schenk, to foreclose a mortgage on certain lands which had been given by the defendants to Henry Ritter in his lifetime, to secure the payment of four certain promissory notes, dated June 7, 1866: one for \$600, due September 1, 1866; one for \$400, due January 1, 1867; one for \$650, due September 1, 1867, and one for \$650, due September 1, 1868. The notes were all payable with interest, at the rate of ten per cent per annum. The bill was filed to foreclose the mortgage for a balance claimed to be due on the note due September 1, 1868, the others having been paid and taken up by the mortgagor before the bill was filed. The defendants in their answer set up payment of the note, and the circuit court, on the hearing, on the evidence, found that the note had been paid, and rendered a decree dismissing the bill. The decree was affirmed in the Appellate Court, and complainant in the bill sued out this writ of error.

On the trial, the evidence of Anna Schenk, the wife of John G. Schenk, was offered and allowed to be read, for the purpose of proving payment of the note by her, as agent of her husband. The admission of this evidence is relied upon as error. We shall not stop to inquire whether the court erred in the admission of this evidence, for the reason that the payment of the note was proven by other testimony, and if the court erred in the admission of the evidence of the wife, such an error is no ground of reversal where the record contains evidence which is competent, sufficient to sustain

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the decree. If the evidence of the wife was incompetent, it will be presumed the court disregarded it on the rendition of the decree, and determined the case on the legitimate evidence which was introduced on the hearing, and when this has been done, and the evidence in the record is sufficient to sustain the decree, it will be affirmed.

This brings us to the consideration of the evidence in regard to the payment of the note. Much reliance is placed on the fact that the note had never been surrendered to the defendant, but was in possession of complainant. The possession of the note in the hands of complainant, unexplained, was *prima facie* evidence that it had not been fully paid, and when the note was produced by complainant, and offered in evidence, the burden of proof rested on defendant to establish payment by a preponderance of evidence. Was the evidence of defendant sufficient? If it was, the decree dismissing the bill was right, and it will have to be affirmed.

It appears that Henry Ritter, the payee of the notes, died in November, 1870. Prior to his death the two notes first due had been paid, and surrendered to Schenk. After the death of Ritter, the note in question, upon which no payments had been made, and the other note for \$650, due September 1, 1867, came into the hands of Herman Ritter, son and agent of complainant. On the back of the last note the following credits were indorsed: January 1, 1869, \$159.62; September 11, 1869, \$600, which would leave a small balance due on this note, and the principal, and interest from the date thereof, due on the note in question at the time Ritter died, and when the notes came into the hands of his son for collection. Subsequently, and on the 31st of January, 1871, a credit of \$265 was indorsed on the note in controversy. After this payment, and on or about the 8th day of February, 1872, defendant claims he paid \$800, which discharged the entire indebtedness. The mortgage debt on February 8, 1872, unless the interest was

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compounded, which could not be done, would not exceed \$800. The defendant testified, clearly, that the sum of \$800 was paid. He details the circumstances under which the money was paid; he says he had it in eight packages, of \$100 each, and his wife, under his direction, paid it over to Ritter. In regard to the payment of the money, the defendant is corroborated by John Schiple, who was present at the time, and saw the money paid. He testified: "I was present when Mrs. Schenk paid Herman Ritter some money. It was in the month of February, 1872. I was standing in the door at Ritter's lumber yard office, and Mrs. Schenk had some money in a pocket handkerchief. She handed it to him. The money was rolled up in a newspaper, in eight different papers. Ritter opened one package, counted it, and asked Mrs. Schenk how much was in a package. He said, \$100 in each roll? She said yes. He counted it, and said there is \$800, all right. The reason why I was present at that time is, I had come there to get some lumber. I don't know what Mrs. Schenk paid this money to Ritter for. John G. Schenk and Philip Daum were present at the time the money was paid. Mr. Schenk said, I was here yesterday to pay you the money, but you would not take it because you wanted compound interest,—that is, there was a dispute about compound interest."

Here is the evidence of two witnesses who testify that \$800 was paid in February, 1872, and the evidence is not contradicted by Ritter, or any other person. Ritter is unable to state the amount of money he did receive at or about that time. Had he kept a book in which he entered the amount of money received on account of the estate, and had he been able to testify that no such sum of money was received, there might be some ground for calling in question the veracity of the two witnesses upon this point; but such was not the case. Although Ritter remembers the fact that Schenk and his wife, and the witness Schiple, were present at the time men-

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tioned, and that money was paid, he has no means of telling the amount paid. The fact that the note was not surrendered when the \$800 was paid, might be regarded as a circumstance tending to show that it was not fully paid, had there been no evidence tending to explain this fact, but the explanation is found in the fact that Ritter computed compound interest on the note, and retained possession of the note because the money paid was not sufficient to discharge the note and compound interest. Nor do we regard the fact of any importance, that, in 1873, the defendant paid Ritter interest on the balance he claimed to be due. If the amount due on the note was paid in February, 1872, as the evidence shows it was, the fact that Schenk, in ignorance of his rights, made a subsequent payment, on demand of Ritter, would not conclude him, when sued on the note, from proving a prior payment in full. We are fully satisfied that the entire amount of the mortgage indebtedness was paid.

The decision of the Appellate Court will be affirmed.

Decree affirmed.

THE FIRST NATIONAL BANK OF FLORA

v.

AARON R. BURKETT.

Filed at Mt. Vernon January 18, 1882.

1. **INSOLVENT DEBTORS**—*discharge from arrest or imprisonment—malice as "the gist of the action."* The word "malice," in sec. 2, ch. 72, Rev. Stat., entitled "Insolvent Debtors," implies a wrong inflicted on another with an evil intent or purpose. It requires the intentional perpetration of an injury or wrong on another. Such intention to commit the wrong is necessary to deprive the party of the right to a discharge from arrest or imprisonment under the act.

2. A party shipped a lot of hogs to commission merchants in Cincinnati for sale, taking a bill of lading from the railroad company, after which he

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applied for and obtained a loan of \$400 from a bank, giving the bank a sight-draft on the commission merchants for that sum, and pledging the bill of lading, which he attached to the draft, and then, before the draft was presented, collected the entire sum due from the commission men, leaving nothing to pay his draft, which was protested: *Held*, that his act in collecting the money, after giving the draft, was an intentional wrong, little, if anything, short of a criminal act, and was malicious, in the statutory sense.

3. So where a judgment was recovered in an action on the case based upon such cause of action, and upon the non-payment of the judgment a *capias ad satisfaciendum* was issued, under which the defendant was arrested and imprisoned, it was *held*, that by reason of his wrongful act he could not avail of the provisions of the Insolvent Debtor's act to obtain his discharge from the imprisonment.

4. ACTION—*what is the gist*. The *gist* of an action is the cause, ground or foundation of the suit, without which it will not lie, or in other words, the ground essential to give rise to a cause of action.

5. SAME—*when malice is of the gist*. If a party wrongfully and dishonestly draws money of his own in the hands of another, after giving a draft for the same to one who advances him the money upon it, the fraud so practiced upon the party advancing him the money is of the essence or foundation of an action on the case against him, and is malicious, within the statutory sense of that word, as used in section 2 of the Insolvent Debtor's act.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Clay county; the Hon. C. S. CONGER, Judge, presiding.

Mr. RUFUS COPE, for the appellant.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that appellee shipped by rail to Cincinnati, Ohio, sixty-five head of hogs. He consigned them to Green, Huddleson & Co. for sale, taking a bill of lading from the railroad company. He applied to the First National Bank of Flora for a loan of \$400. He drew a sight draft for that sum on Green, Huddleson & Co., and pledged the bill of lading, subject to charges, for its payment, and attached it to the draft. The hogs were received and sold, realizing \$425, but before the draft was presented, appellee collected that and all other money he had in the hands of that firm. When

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the draft was presented, for the want of funds in the hands of the drawees it was protested for non-payment. The bank thereupon brought case, and on trial recovered a judgment against appellee for the sum of \$401.38, which has not been paid or satisfied. Fraud was averred in the declaration as the ground of action.

Afterwards, the judgment remaining unpaid, plaintiff sued out a *capias ad satisfaciendum*, and under it defendant was imprisoned. He thereupon filed a petition to the county court for a discharge, on the ground that he was illegally committed. The bank answered, setting out the proceedings in full in the suit in which it had recovered the judgment, but the county court sustained a demurrer to the answer, and discharged defendant. The bank appealed to the circuit court, where the judgment was affirmed. The bank thereupon appealed to the Appellate Court for the Fourth District, where the judgment of the circuit court was affirmed, and the case is brought to this court on a certificate that the case involves a question of law which is required to be passed on by this court.

The assignment of errors questions the correctness of the construction given by the Appellate Court to the second section of chapter 72, in relation to insolvent debtors. It provides, that "when any person is arrested or imprisoned upon any process issued for the purpose of holding such person to bail upon any indebtedness, or in any civil action wherein malice is not the *gist* of the action, or when any debtor is surrendered or committed to custody by his bail in any such action, or is arrested or imprisoned upon execution in any such action, such person may be released from such arrest or imprisonment by complying with the provisions of this act." No question as to such compliance is raised on this record, it being contended that under the facts disclosed appellee was not entitled to a release,—that the *gist* of the action in which judgment was recovered, was malice.

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This court had occasion, in the case of *The People v. Greer*, 43 Ill. 213, to give a construction to this clause of the section. It was there said, that the intention was to release all persons confined on civil process, by their compliance with the requirements of the statute, although the cause was founded in tort, unless the tort was malicious, or, what amounts to the same thing, where the tort originated in malice or where malice was the *gist* of the action. What, then, is malice?

In the case of *Harpham v. Whitney*, 77 Ill. 32, the case of *Mitchell v. Jenkins*, 5 B. & A. 594, was referred to as defining malice. It was there said by PARKE, J., "that the term 'malice' in this form of action, is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." That definition was applied in a case of malicious prosecution. The term has been defined: "A formed design of doing mischief to another,"—"a wicked intention to do an injury to another." Thus, the forsaking of a husband or wife of the other, without sufficient cause, is said to be a malicious abandonment. Malicious mischief is the wanton or reckless destruction of or injury to property. It in some cases implies a wrong inflicted on another with an evil intent or purpose, and this is the sense in which it is employed in this statute. It requires the intentional perpetration of an injury or wrong on another. The wrong and intention to commit the injury are necessary to deprive the party of the right to a discharge from arrest or imprisonment. In this case there was an intentional wrong, little, if anything, short of a criminal act, and it was malicious, in the statutory sense.

Being malicious, was it the *gist* of the action? The *gist* is defined to be the cause for which an action will lie,—the ground or foundation of a suit, without which it would not be maintainable,—the essential ground or object of a suit, and

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without which there is not a cause of action. In this case an action on the case could not have been maintained had not the defendant wrongfully and dishonestly drawn the money for which the hogs were sold, and for which he had given a draft to the bank on Green, Huddleson & Co., and for which draft the bank paid him. This fraud was of the essence or foundation of the action, and in the statutory sense it was both wicked and malicious.

We are therefore of opinion that the county court erred in discharging appellee from the arrest and imprisonment, and it was error in the circuit and Appellate courts to affirm the judgment, and the judgment of the latter court must be reversed, and the cause remanded.

Judgment reversed.

Mr. JUSTICE SCOTT dissenting.

CHARLES H. STARK *et al.*

v.

ANSEL L. BROWN *et al.*

Filed at Mt. Vernon January 18, 1882.

1. INFANTS—GUARDIAN AD LITEM—*duty of guardian.* It is the duty of a guardian *ad litem* of infant defendants, to submit to the court, for its consideration and decision, every question involving the rights of his wards.

2. SAME—*duty of the court.* But the court will protect the rights of infants where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf.

3. SAME—*pleading and evidence—what defences under general answer of guardian.* On a bill for partition against infants, the guardian *ad litem* answered, praying the protection of the court for his wards, and denying that the petitioners had any interest in or title to the premises: *Held*, that under such answer all defences that could be legally availed of, under any answer, were to be considered as interposed on behalf of the minors, and hence they could avail of the Statute of Limitations under the act of 1839.

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Statement of the case.

4. *LIMITATION—whether properly pleaded.* On a bill for partition the adult defendants answered, denying that the petitioners had any interest in the land, and alleging that the tract was owned by their father, that he sold the same to another, since deceased, whose heirs are the owners of it, subject to a deed of trust or mortgage executed by such grantee to their father, and that the former, at the time of his death, was in the actual possession of the premises, and had been for several years, and had placed upon the same valuable and permanent improvements, and that their father and his said grantee had paid the taxes thereon for thirty years, consecutively: *Held*, that such answer was not technically sufficient to present a defence under the second section of the Limitation law of 1839.

5. *PURCHASER—who may purchase at tax sale—and acquire color of title.* An administrator of an estate, having no power or control over the land of his intestate, and not being required to pay the taxes thereon, may rightfully become the purchaser of the same, as against the heirs, at a sale for the taxes thereon, and set up his deed as color of title, under the Limitation law of 1839.

6. *PRACTICE—when to object—admission of evidence under defective pleading.* Although an answer setting up a defence of the Limitation law of 1839 be technically defective, if no exception is taken to it, and no objection is made on the hearing to evidence tending to show color of title in an ancestor of the defendant, or payment of taxes by him or his grantee, and the case is tried precisely as if the defence had been formally pleaded, such evidence may be considered, and an objection to the answer and the evidence under it, for the first time in this court, comes too late.

7. *ADMINISTRATOR—powers and duties in respect to land.* It was not the duty of an administrator, under the laws in force in 1844, to pay the taxes upon the lands of his intestate, the title being in the heirs, who were entitled to the rents and profits. His power was only to apply for and obtain leave to sell the lands for the payment of debts, and he could not take any steps to remove liens or incumbrances of any kind.

WRIT OF ERROR to the Circuit Court of Madison county;
the Hon. AMOS WATTS, Judge, presiding.

William P. Hall, now deceased, in his lifetime was the owner of the patent title to the south-west quarter of the south-west quarter of section twenty-eight (28), in township four (4) north, of range seven (7) west of the third principal meridian. Said William P. Hall died intestate on the 8th of October, 1839, leaving certain children surviving him as his heirs at law, who have all since conveyed their interest

Statement of the case.

in said tract of land to William H. Hall, and subsequently said William H. Hall conveyed an undivided half of said tract to Ansel L. Brown. Brown filed his petition for partition in the office of the clerk of the circuit court of Madison county, to the October term, 1879, of that court, against William H. Hall and the plaintiffs in error. A guardian *ad litem* was appointed to answer and defend for William Prunse, Charles Prunse, Dorris Prunse, Henry Prunse, and Frederick Prunse, who were minors, and without guardian. He answered, praying the protection of the court for his wards, and denying that either the said petitioners or the said Hall had any interest in or title to the premises.

Amelia Fressen, one of the children and heirs at law of William Prunse, deceased, together with her husband, George Fressen, answered, denying that Brown or Hall had any interest in or title to said real estate, in possession, remainder, reversion, or otherwise, and averring that she, together with her co-defendants, William Prunse, Charles Prunse, Dorris Prunse, and Frederick Prunse, are the owners in fee simple of said premises, and derive title thereto by descent from their deceased father, William Prunse, and deny that petitioner is entitled to the relief prayed for. Charles H. Stark, Nicholas C. Stark, and Rachel M. Stark, answered, denying that either Brown or Hall have any interest in said tract of land, and alleging that said tract was owned by Solon Stark, their father, in fee, in his lifetime; that he sold and conveyed the same to William Prunse, since deceased; that the heirs at law of said Prunse are the owners of said land, subject to a deed of trust or mortgage executed by said Prunse to said Stark; that said Prunse was, at the time of his death, in the actual possession of said premises, and had been for years past, and has placed upon the same valuable and permanent improvements; that said Stark and said Prunse have paid the taxes on said land for thirty years, consecutively.

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On hearing, the circuit court decreed in conformity with the prayer of the petition, declaring that the title and claim of the plaintiffs in error was void and of no effect, etc.

MESSRS. KROME & HADLEY, and Mr. DAVID GILLESPIE, for the plaintiffs in error.

MESSRS. IRWIN & SPRINGER, for the defendants in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Whatever title Solon Stark, in his lifetime, obtained to the tract of land in controversy, the plaintiffs in error have, and they therefore, on the hearing, gave evidence tending to show that he had color of title, made in good faith, and paid all taxes assessed thereon for more than seven successive years, and so that their defence against the claim of Brown and Hall, under the patent title, was complete, by virtue of the second section of the act of March 2, 1839, entitled, "An act to quiet possessions, and confirm titles to land."

But the objection is made that this defence is not set up in the answers, and can not, therefore, be sustained,—and the consideration of this question necessarily precedes all discussion upon the merits. William Prunse, Charles Prunse, Dorris Prunse, Frederick Prunse, and Henry Prunse, were minors at the time of the hearing, and answered by their guardian *ad litem*. It was the special duty of the guardian *ad litem* to submit to the court, for its consideration and decision, every question involving the rights of his wards. *Knickerbocker v. De Freest*, 2 Paige, 304. And the court will protect the rights of infants, where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf. *Stephens et al. v. Van Buren et al.* 1 Paige, 479. The principle has been approvingly recognized by this court in *Peak v. Pricer*, 21 Ill. 164; *Rhoads v. Rhoads*, 43 id. 239; *Chaffin v. Heirs of Kimball*,

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23 id. 36; *Fischer v. Fischer*, 54 id. 231; *Cartwright v. Wise*, 14 id. 417. We are, therefore, of opinion that under the answer filed by the guardian *ad litem*, all defences that could be legally availed of, under any answer, are to be considered as interposed on behalf of the minors.

The answer of the Starks, who claim as holders of a mortgage executed by William Prunse to Solon Stark, is, undoubtedly, not technically sufficient to present a defence under the second section of the Limitation act of March 2, 1839, *supra*, upon the authority of *Nichols v. Padfield*, 77 Ill. 253. Still, it does show that title in Solon Stark, and payment of taxes by him, are relied upon as a defence, and no exception was taken to its sufficiency, and no objection was urged to the introduction of evidence tending to show color of title in Solon Stark, or payment of taxes, etc., by him, upon the hearing. The case would seem to have been tried precisely as if the defence of color of title in Solon Stark, made in good faith, and payment of taxes thereunder by him for seven successive years, had been specifically set up in the answer as a defence under the second section of the Limitation act of 1839. Had exceptions been sustained to the answer for this reason, or had objection been urged to the introduction of evidence on the hearing, upon the ground that this defence was not set up in the answer, it would have been within the power of the court to have allowed the answer to be amended, so as to obviate all objection. *Jefferson County v. Ferguson et al.* 13 Ill. 33.

We are, therefore, of opinion that under all the circumstances, the objection, so far as it affects the answer of the Starks, is also untenable. It is urged for the first time in this court, and must be regarded as coming too late.

We come, then, to the question, was the deed to Solon Stark made in good faith? There is no controversy but that it is good color of title, and it is admitted that he paid taxes under it for more than seven successive years. Solon Stark administered upon the estate of William P. Hall, deceased, on the

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2d of January, 1840, and his administration continued as late as March, 1849. He obtained an order of the proper court to sell real estate to pay debts, and sold a large amount of real estate for that purpose; but, notwithstanding this, the estate was insolvent, and a considerable per cent upon the debts was never paid. Stark, as administrator, returned no inventory of this tract of land, and obtained no order to sell it to pay debts. The taxes assessed against it for the year 1843 being unpaid, judgment was rendered for the same by the circuit court of Madison county, at its May term, 1844, and the land was subsequently sold under that judgment to Solon Stark; and there being no redemption from this sale, the sheriff of Madison county executed a deed to him for the land, on the 4th of December, 1848.

The contention of defendants in error is, that Solon Stark, by virtue of his position as administrator, was a trustee over this land, and could not, therefore, in good faith purchase it. Was he such trustee? It was not the duty of the administrator to pay the taxes on this land. It descended to the heirs at law, and they at once became entitled to the rents and profits thereafter maturing. (*Green v. Massie*, 13 Ill. 363.) The administrator, in the contingency, only, of the insufficiency of the personal estate to pay the debts, is empowered and required to make application for a decree authorizing him to sell the real estate to supply the deficiency in the assets; but he is limited strictly to obtaining and executing such decree, and is not authorized to remove incumbrances or liens of any kind which may affect the real estate. *Phelps v. Funkhouser*, 39 Ill. 401; *Cutter v. Thompson*, 51 id. 390; *Gridley v. Watson*, 53 id. 186; *Shoemate et al. v. Lockridge*, id. 503; *Foltz v. Pruse*, 17 id. 487; *Walbridge v. Day*, 31 id. 379; *Helm v. Cantrell*, 59 id. 524; *Stone v. Wood*, 16 id. 177; *Sutherland v. Harrison*, 86 id. 363.

The question here is between the administrator and the heirs at law. The duty of inventorying real estate affects

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creditors of the estate only. It furnishes notice to them of the existence of such estate, but the rights of the heirs are unaffected by it in any way. In the present instance, if the estate had been inventoried, as it should have been, it would, or at least should, also have been included in the decree, and sold for the payment of debts; and it is impossible that the heirs can have been in any way prejudiced by not having had it so included and sold. Since, then, the administrator owed no duty to pay the taxes assessed against this land, and owed no duty in regard to it affecting the rights of the heirs which he has failed to discharge, we are of opinion he might, in good faith, become its purchaser at a sale for taxes. His purchase conflicting with no duty he owed the heirs at law in regard to the land, in allowing it to be made, no temptation is afforded to a betrayal of trust.

It has been held, and the principle would seem to be controlling here, that an administrator may lawfully deal with property of his intestate which is not within his control as administrator, as, for instance, property in a different State, and administered upon by a different administrator under the laws of that State. *Sheldon v. Rice*, 30 Mich. 296.

There is no other circumstance in evidence tending to impeach the good faith of Stark's title. Indeed, the tendency of the evidence is, very clearly, to show that he was endeavoring to, and supposed in fact he was, getting a good title. Even where it is shown a party knows of defects in a title, we have held it was not conclusive evidence of bad faith. *Davis v. Hall*, 92 Ill. 85; *Smith v. Ferguson*, 91 id. 304; *Cook v. Norton*, 43 id. 391.

We think, under the evidence, the decree below is erroneous. It is, therefore, reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

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SCOTT and SHELDON, JJ.: We do not concur in the view that the administrator of an estate may purchase at a sale for the taxes the lands of his intestate, and hold them for himself. We think that holding the relation he does, under our law, toward the estate and the intestate's lands, the policy and principles of the law do not allow him thus to acquire title to such lands for his own benefit,—that the purchase of them at a tax sale should be held to inure for the benefit of the estate, and be held but as a mode of payment of the taxes on the lands on behalf of the estate, and hence that title so acquired by an administrator is not color of title in himself, in good faith.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY

v.

JOHN W. KARNES.

Filed at Mt. Vernon January 18, 1883.

1. EMINENT DOMAIN—*lawfulness of possession obtained under the act—before and after a reversal.* After an appeal had been prayed and allowed in favor of the land owner, in a proceeding to condemn his land for a right of way, in which his compensation had been fixed by a jury, the railroad company seeking the condemnation paid the sum found by the jury to the county treasurer, and gave the proper bond, as required by the statute, to give a right to enter upon the land. Before the judgment in the proceeding was reversed, on the appeal to this court, the land owner accepted the money deposited with the treasurer, which he never offered to return, and without causing the remanding order to be filed and the cause redocketed for further proceedings brought ejectment against the lessees of the railroad company for the land used as a right of way: *Held*, that as the possession, when first taken, was lawful, the mere reversal of the judgment without taking any further steps, or returning or offering to return the money paid, did not render the continuance of such possession unlawful, and that the action could not be maintained.

2. The reversal of a judgment condemning land for a right of way, on appeal by the land owner, will not divest the possession of the corporation

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procuring the condemnation lawfully obtained, or render its continuance unlawful. It has no effect whatever upon the right of possession. In such case, if the land owner deems the compensation allowed and paid to him as insufficient, he should, within two years after the reversal, have the cause remanded and docketed, giving the proper notice, and have another trial. If he fails to do so, and retains the sum paid him, he may be regarded as abandoning any claim for further compensation.

3. *EJECTMENT*—*must be an unlawful entry and unjust detention.* The action of ejectment proceeds for the possession of premises, claiming that they have been unlawfully entered and unjustly withheld, and facts which go to disprove these, make a legal defence.

APPEAL from the Circuit Court of Saline county; the Hon. N. M. LAWS, Judge, presiding.

Messrs. YOUNGBLOOD & MOYERS, for the appellant, contended that the acceptance of the compensation fixed by the jury by the appellee, pending his appeal, and his retaining the same after reversal of the judgment of condemnation, estops him from maintaining ejectment for the land embraced in the right of way, citing *Bigelow on Estoppel*, 514; *Raplee v. Stewart*, 27 N. H. 310; *Duff v. Wynkoop*, 74 Pa. St. 300; *Swanson v. Tarkington*, 7 Heisk. 612; *Keen v. City of Chicago*, 38 Ill. 322; *Martel v. City of East St. Louis*, 94 id. 67; *McCarthy v. Lavasche*, 89 id. 270.

That an estoppel may be shown in defence of an action of ejectment: *Noble v. Christman*, 88 Ill. 186.

It was not the duty of the company to have the case redocketed. The acceptance of the condemnation money pending the appeal, and its retention, justified the assumption that Karnes had concluded to acquiesce in the assessment. Laws of 1877, p. 745, secs. 84, 85.

The evidence offered and refused showed a rightful entry upon the premises, and a lawful continuance of that possession, and should have been admitted as showing a defence.

Mr. H. H. HARRIS, for the appellee:

The condemnation proceeding upon which appellant relies for a defence was reversed, and has never since been redock-

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eted, and hence the proceeding to condemn has been abandoned. Laws of 1877, p. 152, sec. 34.

An estoppel *in pais*, being merely an equitable right, can not avail in a suit at law. In ejectment the legal title must prevail. *Blake v. Fash*, 44 Ill. 303; *Mills v. Graves*, 38 id. 464.

If the appellant had purchased the land from Karnes, and paid him in full, still Karnes could maintain ejectment. *Fleming v. Carter*, 70 Ill. 280.

MR. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of ejectment, brought by Karnes, the appellee, against the St. Louis, Alton and Terre Haute Railroad Company, the appellant, to recover possession of the lands described in the declaration, which are occupied by appellant as right of way for the Belleville and Eldorado railroad, of which road appellant is lessee. The plaintiff recovered, and the defendant appealed.

On the trial in the court below the defendant offered in evidence the record of a condemnation proceeding had in the county court of Saline county, where the lands in controversy are situate, on petition of the Belleville and Eldorado Railroad Company to condemn these lands of the plaintiff for the right of way of such railroad, showing that a trial was duly had between the parties, before a jury, for the assessment of the compensation for such right of way, the verdict of a jury fixing such compensation, and judgment duly rendered thereon, the taking of an appeal from the judgment by Karnes to the Supreme Court, on December 18, 1876, and the prescribing by the court, under the statute, of the bond which the railroad company should give to authorize its entry upon the use of the property condemned. The plaintiff objected to the introduction of the record, on the ground that the judgment had been by the Supreme Court, at its June term, 1878, reversed, and the cause remanded, and had never,

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by either of the parties, been reinstated on the docket of the Saline county court, which objection the court sustained, and rejected the offered evidence. An offered receipt by Karnes from the county treasurer of Saline county, dated February 17, 1877, of the condemnation money paid by the railroad company, was in like manner rejected. Karnes testified in the case, that on February 27, 1877, he received from the county treasurer of Saline county the condemnation money paid to the treasurer by the railroad company for the right of way over his lands for which this suit was brought; that he had never paid, or offered to pay, any part of the money back to the railroad company, or any of its agents, and that he did not propose to pay it back, for he thought the company had damaged him more than that amount.

It was admitted by the parties that the judgment in the condemnation proceeding was by the Supreme Court reversed, and the cause remanded, after Karnes received the condemnation money from the county treasurer, and that the railroad company executed the bond, as prescribed by the court, at the time of taking the appeal by Karnes, and that the railroad company paid all the condemnation money fixed by the jury before the company entered on the premises; that the defendant company was the lessee of the Belleville and Eldorado railroad company, and as such lessee occupied the premises described in the declaration.

We are of opinion the court below erred in rejecting the evidence of the record of the condemnation proceedings, and that such evidence, if it had been admitted, would have shown, in connection with the other evidence in the case, a defence to the suit. It would have shown the ascertainment, by the verdict of a jury under the Eminent Domain act, of the compensation to be paid by the railroad company for the land, an appeal taken from the assessment by the land owner, and the giving thereupon by the railroad company of the requisite bond, under the statute entitling it to

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enter upon the use of the property on payment of the compensation fixed by the jury, the full payment by the railroad company of such compensation, and its acceptance and the retaining of it ever after by the owner of the land. After the amount of the compensation to be paid to the land owner has been found by the jury, under the Eminent Domain act, the 10th section of the act directs that the court shall make an order that the petitioner enter upon the property sought to be condemned, and the use of the same, upon payment of the compensation as ascertained by the finding of the jury, and that such order, with evidence of such payment, shall constitute complete justification of the taking of the property.

There exists in this case the justification of such order and evidence of payment. True, an appeal was taken by the defendant in the proceeding, as provided for by sections 12 and 13. But it is the provision of the 13th section, that notwithstanding such appeal the petitioner shall have the right to enter upon the use of the property, upon entering into bond, with sufficient surety, to be approved by the court, to the party interested, for the payment to him of "such compensation as may be finally adjudged in the case." Such bond, so approved, was given by the railroad company. It paid the compensation which had been adjudged, to the county treasurer, as the act prescribes may be, and the defendant in the proceeding received it from the treasurer, and the railroad company entered into the possession of the premises. This was a rightful possession, acquired in the exact mode prescribed by the statute, whereby the company might, after the taking of the appeal, rightfully enter upon the use of the property. This lawful possession, so acquired, has remained ever since, for aught we see. The reversal of the judgment, on the appeal, did not divest the possession, or render its continuance unlawful. There is no intimation in the statute that the reversal shall have that effect, or any effect whatever upon the right of possession, it being entirely silent in

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that regard. The company had the enjoyment of the use of the land, and, as an equivalent therefor, the defendant had the compensation for such use, as it had been ascertained by the finding of a jury, and he held the bond of the company for the payment of any further compensation which might be adjudged in the case. No further compensation has been adjudged, so that there has nothing occurred since the entering into possession to affect the railroad company with any default whatever.

The judgment appealed from was reversed for error in an instruction given to the jury. Had the defendant, after the reversal, desired the opportunity of having the question of his right to any further compensation submitted to trial before another jury, it was open to him to proceed further in the case for such purpose. He lay by for two years without taking any step in that way.

It is the provision of the statute that when a cause is remanded by the Supreme Court, upon a transcript of the order of the court remanding the same being filed in the court from which the cause was removed, and the prescribed notice given to the adverse party, the cause shall be reinstated therein, and that if neither party shall file such transcript within two years from the time of making the final order of the Supreme Court remanding any judgment or proceeding, the cause shall be considered as abandoned, and no further action shall be had therein. (Laws 1877, p. 152, secs. 83, 84.) If, by delay in not moving to have the proceeding reinstated in the county court within the two years limited by the statute, appellee has lost his chance for having an assessment of any further compensation made in that case, the fault is his own. The railroad company had given to it the right of entering upon the use of the property, with its bond given for the payment of such compensation as might be finally adjudged in the case. The company being content with the compensation that had been assessed in the case,

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which it had paid and the defendant had accepted, and it failing after the reversal to take any step toward the reinstatement of the case in the court below, it was for the defendant to move in that direction in order to have another assessment of compensation made in the case, and his not doing so might warrant the conclusion that he was content with the compensation which had been adjudged and received by him. At any rate, we can not see how the company's rightful possession, given to it under the statute, can be regarded as changed into a wrongful possession, so long as it is in no default in not paying any further compensation adjudged in the case. As said by this court in *Stow v. Russell*, 36 Ill. 36, ejectionment "proceeds for the possession of the premises, claiming that they have been unlawfully entered into and unjustly withheld. Facts which go to disprove these, make a legal defence."

There would not appear here to have been an unlawful entry into or an unjustly withholding of the premises claimed, but, on the contrary, a possession by defendant which had been expressly given by the statute.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

JAMES C. NORRIS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Mt. Vernon January 18, 1882.

MURDER—*sufficiency of the evidence to convict.* Where the deceased, who was shot by assassins, in his dying declaration stated that the defendant and his confederates were distinctly recognized by him at the time of the shooting, which was corroborated by another witness' testimony of a conversation with the defendant, which tended to show his guilty knowledge and

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apprehension of arrest for the killing, and the defence was an *alibi* attempted to be shown by those charged as being confederates and actors in the homicide, and their relatives, it was *held*, that the evidence did not justify the court in granting a new trial on a conviction, and sentence of the defendant to the penitentiary for eighteen years.

WRIT OF ERROR to the Circuit Court of Williamson county;
the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. WILLIAM W. CLEMENS, for the plaintiff in error:

The law is, even in civil cases, and where the evidence is conflicting, if the verdict is against the clear weight and preponderance of the evidence it will not be allowed to stand. *Black v. McMullen*, 91 Ill. 32; *Dawson v. Robins*, 5 Gilm. 72; *Dufield v. Cross*, 13 Ill. 699; *Summers v. Stark*, 76 id. 210; *Bunker et al. v. Green*, 48 id. 247; *Jacquin v. Davidson*, 49 id. 83; *Bell v. Gordon*, 86 id. 501; *Southworth v. Hoag*, 42 id. 449; *Toledo, Wabash and Western Ry. Co. v. Moore, Admx.* 77 id. 219; *Chicago, Burlington and Quincy R. R. Co. v. Gregory*, 58 id. 274; *Lowry v. Orr et al.* 1 Gilm. 83.

The rule that an appellate court will not interfere to set aside a verdict unless it is palpably against the evidence, obtains in the largest sense in civil cases; the rule is not so strict in criminal cases, especially of a capital character. In criminal cases, new trials have been constantly granted by the Supreme Court upon its conviction that verdicts were not warranted by the proof. *Falk v. People*, 42 Ill. 333.

The Supreme Court reversed a conviction where the defence of an *alibi* was set up and maintained by one witness. *Otmer v. People*, 76 Ill. 153.

Mr. JAMES MCCARTNEY, Attorney General, for the People, commented upon the evidence, contending that it was sufficient to sustain the conviction, and upon the evidence of an *alibi*, and to show that a new trial should not be granted in such a case as this, cited *Connaghan v. People*, 88 Ill. 460; *Needham v. People*, 98 id. 275; *Higgins v. People*, id. 519.

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Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

At the May term, 1876, of the Williamson county circuit court, the plaintiff in error was convicted of the murder of James Henderson, and sentenced to the penitentiary for the term of eighteen years. This writ of error is prosecuted for the purpose of having that conviction reversed, on the ground that it is not sustained by the evidence.

That James Henderson was murdered, is not a matter of controversy. The claim of plaintiff in error is, that he had no participation in the act. Henderson was shot by assassins, concealed, at first, behind a log heap, some thirty or forty yards distant, while he was reclining upon his elbow, which rested on the ground, with his back toward the assassins. There were three of the assassins, each armed with a shotgun, and they fired, in all, some six or seven times. Immediately after they fired the first time, he turned his body so as to face them, and his dying declaration was that they were in his sight near five minutes, and that they were plaintiff in error, and John Bulliner, and either Emanuel or Monroe Bulliner. His statement is, to some extent, corroborated by the evidence of Jacob Beard, who testified to a conversation had with plaintiff in error on the 21st of May, 1874, in Cairo, tending to show, at least, guilty knowledge and apprehension of arrest in consequence of the shooting of Henderson.

The defence was that of an *alibi*,—that plaintiff in error, at the time of the shooting, was in McNairy county, Tennessee. The evidence by which it is supported, consists, in part, of the testimony of the Bulliners, who are themselves implicated in the shooting, in part of the testimony of their relatives, and in part of the testimony of others not apparently interested. It was, under all the circumstances, a fair question for the jury what effect should be given to this evidence. The Bulliners certainly were interested in discrediting Henderson's dying declaration, and their relatives were interested, in less degree only, the same way. We do not

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regard the *data* given by the other witnesses as that by which they claim to know that plaintiff in error was in McNairy county, Tennessee, at the time of the shooting, as beyond question, and a slight mistake in that regard makes their evidence worthless.

We do not, under all the circumstances, feel warranted in saying the conviction is not sustained by the evidence.

The judgment is affirmed.

Judgment affirmed.

WILLIAM ANDERSON *et al.*

v.

REBECCA J. IRWIN.

Filed at Mt. Vernon January 18, 1882.

101	411
61a	633
101	411
187	144
101	411
108a	233
108a	1840

1. *EVIDENCE—primary and secondary.* It is a familiar rule that no evidence will be received of a fact which, from its very nature, shows there might be better evidence to such fact, without first satisfactorily accounting for the absence of the higher order of evidence. The counterpart of this rule is, that the law is satisfied where the fact sought to be established has been proven by the best evidence of which, in its nature, it is susceptible.

2. *SAME—degree of proof against one who destroys written evidence.* Where one deliberately destroys, or purposely induces another to destroy, a written instrument of any kind, and the contents thereof subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded upon it. In such case, slight evidence will suffice.

3. So, where a will duly executed and attested was destroyed, with the connivance of a part of the heirs of the testator, and no copy appearing to be in existence, in a suit by a devisee not a party to such destruction, it was *held*, that the latter was only required to show, in general terms, the disposition which the testator made of his property by the instrument, and that it purported to be his will, and was duly attested by the requisite number of witnesses.

4. *WILL—evidence as to sanity of testator.* On a bill to establish a will destroyed after the testator's death, proof of the sanity of the testator is not

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indispensable in the absence of any proof that he was not in his sound mind, and in such case the disposition made by him of his property may of itself afford sufficient evidence of his sanity.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Clay county; the Hon. WILLIAM C. JONES, Judge, presiding.

Mr. F. G. COCKRELL, and Mr. J. C. ALLEN, for the plaintiffs in error:

When a party seeks to establish a lost instrument, he must show that it was executed with all the formalities required by law,—that it has been lost or destroyed,—before he can give evidence of its contents. *Kimbell v. Morrell*, 4 Greenl. 368; 2 Greenleaf on Evidence, sec. 368; *Owen v. Thomas*, 33 Ill. 320.

The contents of the instrument must be proven by evidence "clear and most stringent." 2 Greenleaf on Evidence, sec. 688 a; *Davis v. Sigourney*, 8 Metc. 487; *Kimbell v. Morrell*, 4 Greenl. 368.

The evidence must show that the testator was of sound mind when the will was executed. *Dickie v. Carter*, 42 Ill. 376; *Andrews v. Black*, 43 id. 256; *Crawley v. Crawley*, 80 id. 469.

Messrs. HAGLE & FINCH, for the defendant in error:

Where a party has suppressed or destroyed any species of evidence or written instrument, or refuses to produce books and papers; his opponent may give parol proof of their contents, if they are shown to be, or to have been, in possession of the opposite party; and if such secondary evidence is imperfect, vague and uncertain, every intendment and presumption shall be against the party who might remove all doubt, etc. And where there is sufficient evidence to warrant the belief that the opposite party once had the instrument in his possession, the rule applies with all its force. *Rector v. Rector*, 3 Gilm. 105; *Winchell et al. v. Edwards et al.* 57 Ill. 41.

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The right of a party claiming under a will, arises out of the will itself, and becomes a vested right at the death of the testator. The probate, or proof, of the will does not confer the right, but is merely the evidence, or furnishes the means of procuring the evidence, of a right already vested. *Shepard v. Carriel*, 19 Ill. 313.

Testamentary capacity exists when the testator has an understanding of the nature of the business in which he is engaged, the value of his property, and is capable of managing his ordinary business affairs. Tested by this well known rule, the testamentary capacity of the testator is fully established. *Roe v. Taylor*, 45 Ill. 405.

Mr. JUSTICE MULKEY delivered the opinion of the Court :

Joseph Anderson died on the 28th of May, 1879, leaving Patsy Anderson, his widow, since deceased, and William, John, Thomas, Joseph, and George Anderson, and Rebecca J. Irwin, his children, and William P. McKee, a grand-son, his only heirs at law. At the time of his death he left an instrument purporting to be his last will and testament. It was found among his effects, sealed up in an envelope, indorsed "Joseph Anderson's Will." A short time after his death a meeting was appointed at William's for opening and examining the will, to which all the heirs were invited but the daughter and grand-son. William, John and Thomas were present at the meeting. None of the other heirs attended. The instrument was opened and read by Robert Walker, who was subsequently appointed administrator of the estate, in the presence and hearing of the widow and three attending heirs. It purported to be the will of the deceased, and was witnessed by George D. Ramsey and S. S. Clark. By the provisions of the will the testator gave his entire estate to his wife for life, and divided the remainder, after charging John with \$475, with interest at ten per cent per annum from 1856, and William with \$400, with like

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interest from 1866, equally among the heirs. This meeting occurred on the 5th of June, 1879. At the conclusion of it, Thomas, who was named as executor, took possession of the will and kept it till the 13th, when he returned it to William. On the 22d of the same month, Thomas went to see his mother, then at William's, and told her he could not probate the will on account of ill health, when she informed him she intended to burn it. He thereupon told her if she was determined to burn it, to call some one besides the family. She then started off towards the fire, and afterwards told him she had burned it. Under this state of facts the daughter, Mrs. Irwin, filed the present bill, by which she seeks to establish the instrument in question as the will of her father, and to have the estate of the testator distributed according to its provisions.

The circuit court of Clay county found the equities with the complainant, and entered a decree in conformity with the prayer of the bill. From that decree Thomas, John and William alone appealed to the Appellate Court for the Fourth District, where said decree was affirmed, and we are now asked to review the judgment of that court.

The objection urged to the decree in this case is, that the evidence fails to show that the alleged will was in fact the will of the testator, or that it was executed in conformity with the statute, and also that the contents of the will are not sufficiently proven. The law is intended to be practical in its application to the varied transactions and circumstances which go to make up the affairs of life, and which are constantly giving rise to legal controversies that have to be settled in courts of justice. Indeed, most of the rules of evidence have been established with direct reference to this principle. Thus, it is a familiar rule that no evidence will be received of a fact which, from its very nature, shows there is better evidence of such fact, without first satisfactorily accounting for the absence of the higher order of evidence,—

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or, more briefly, the law requires in proof of a fact the best attainable evidence. The counterpart of this rule is, the law is always satisfied where the fact sought to be established has been proven by the best evidence of which, in its nature, it is susceptible. The latter rule we regard as important in its application to the circumstances of this case. The instrument in controversy having been destroyed without the fault of the defendant in error, and with the connivance of a part, if not all, of plaintiffs in error who interposed any defence in the court below, and there not appearing to be any copy of it in existence, it would be equivalent to denying the complainant relief altogether to require her to prove the very terms in which it was conceived. All that could reasonably be required of her under such circumstances, would be to show in general terms the disposition which the testator made of his property by the instrument,—that it purported to be his will, and was duly attested by the requisite number of witnesses. This was all fully and clearly shown.

It is worthy of note that the bill is confessed as to all of the defendants who were not present at the meeting at William's when the will was read by Walker, and that of those present at that meeting, Thomas, John and William alone appealed to the Appellate Court, and are the only ones prosecuting this writ of error. It is only necessary, therefore, to consider this case in its relation to them. Viewing it thus, it is difficult, in the light of all the circumstances before us, to repress the conviction that if they did not actually conspire with the mother to destroy the will, they at least connived at it. Their denial under oath, in their answers, of all *personal* knowledge of the will, in the light of the subsequently admitted fact that they were present and saw it taken from the envelope and heard its contents read, is so manifestly a mere play upon words at the expense of the real truth, that they stand in anything but an enviable light before the court. In view of all the facts, we think the maxim, *omnia præsum-*

Syllabus.

untur contra spoliatorem, may properly be applied to this case. In applying this maxim, the rule seems to be well settled that where one deliberately destroys, or purposely induces another to destroy, a written instrument of any kind, and the contents of such instrument subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded thereon. In such case slight evidence will suffice. Broom's Legal Maxims, 576.

As to the objection there is no proof of the sanity of the testator, it is sufficient to say that in the absence of anything tending to show he was not of sound mind, we think, under the circumstances of this case, the dispositions of the will itself afford sufficient evidence of the testator's sanity.

Upon the whole, we are fully satisfied with the decree in the case, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

101	416
207	810

WILLIAM E. ROBBINS

v.

MARTHA J. ROBBINS.

Filed at Mt. Vernon January 18, 1882.

1. DIVORCE—*alimony—decreeing husband's land to wife.* On cross-bill by a wife for a divorce from her husband, it appeared that the husband's real and personal property was worth about \$26,000. On granting the divorce the court gave the wife, for herself and two children, as alimony, \$3000, to be paid in ninety days, and a like sum to be paid in eighteen months, and by the decree gave her the title in fee to 160 acres of his land. On petition of the husband for a modification of the decree, it appeared that he had paid a judgment to the wife's father of \$1390 for her support; that he had paid the first \$3000, and the other \$3000 had been paid by a sale of 240 acres of his land, which sale had passed redemption; that the balance of his lands was incum-

Brief for the Plaintiff in Error.

bered by a claim of dower held by his mother, and that the income derived from them was small, and that the value of the lands had decreased thirty per cent since the final decree; and that none of his property had been derived from or through his wife. The petition was denied: *Held*, that it was error to decree the wife the quarter section of land, and that the \$6000 allowed by the court was quite as large a sum as should have been allowed.

2. Where the husband has obtained no money or property through his wife, and she has contributed nothing to make the property, the court is not justified, on any principle, in decreeing to the wife the title in fee to a portion of his lands, on a divorce. It might be otherwise if the wife, at the time of the marriage, or during coverture, acquired money which passed into the hands of the husband, and he invested it in real estate.

WRIT OF ERROR to the Circuit Court of Lawrence county;
the Hon. WILLIAM C. JONES, Judge, presiding.

Messrs. BREWER & HOFFMAN, and Mr. J. C. ALLEN, for the plaintiff in error, contended that the court allowed the wife too large a sum as alimony, and that as she brought no property to the marriage, it was error to decree her the title to 160 acres of land in addition to the very liberal allowance in money. *Keating v. Keating*, 48 Ill. 241; *Ross v. Ross*, 78 id. 402; *Russell v. Russell*, 4 Green, (Iowa) 26; *Dinet v. Eigenmann*, *Admr.* 80 Ill. 274; *Stewartson v. Stewartson*, 15 id. 145; 46 id. 135.

Alimony should be reasonable and fair, in view of all circumstances. The wife should be held to labor for her own support and that of her children, and not indulged in idleness. The rule as to alimony varies, according to circumstances, between a one-half, which appears to be the highest in extreme cases, down to a small proportion of the estate. And the cases where the court has awarded to the wife a large amount, either in gross or real estate, are when she brought money, personal or real property to the husband, or contributed largely by her industry or economy to the increase of his estate. In support of the view here presented, we cite the following cases: 2 Bishop on Marriage and Divorce, 464, 429, secs. 463, 464; *Andrews v. Andrews*, 69 Ill. 609;

Brief for the Defendant in Error.

Ross v. Ross, 78 id. 402; *Parker v. Parker*, 61 id. 369; *Daily v. Daily*, 64 id. 329; *Footte v. Footte*, 22 id. 425; *Wheeler v. Wheeler*, 18 id. 39; *Hurd's Stat. of 1880*, 424, sec. 18.

Messrs. BELL & GREEN, and Mr. AARON SHAW, for the defendant in error:

There was no error in decreeing to the wife a sum in gross for alimony, and in making it payable in two installments. This has been expressly sanctioned by this court in a number of cases. *Plaster v. Plaster*, 47 Ill. 290; *Draper v. Draper*, 68 id. 17; *Dinet v. Eigenmann*, 80 id. 274.

In decreeing a divorce, at the suit of the wife, the circuit court has the power to assign to her, as alimony, a part of the real estate of the husband. *Armstrong v. Armstrong*, 35 Ill. 109; *Stewartson v. Stewartson*, 15 id. 145; *Wheeler v. Wheeler*, 18 id. 39; *Bergen v. Bergen*, 22 id. 189; *Joliff v. Joliff*, 32 id. 527.

There may, sometimes, be a question as to the propriety of vesting in the wife a portion of the husband's real estate in fee; but in that regard each case must rest upon its own merits. The conduct of the parties may very properly be taken into consideration upon the question of alimony. *Stewartson v. Stewartson*, 15 Ill. 145; *Becker v. Becker*, 79 id. 532; *Bergen v. Bergen*, 22 id. 187.

All the cases in this court that question the propriety of vesting a portion of the husband's real estate in the wife, in fee, must be restricted to the peculiar circumstances of those cases. The power and right of the court are admitted. They were cases in which the court had given to the wife the greater part of the husband's property. *Keating v. Keating*, 48 Ill. 241; *Von Glahn v. Von Glahn*, 46 id. 134; *Ross v. Ross*, 78 id. 402.

There is no inflexible rule by which to determine the amount of alimony in a case like this. It must rest entirely in the sound judicial discretion of the chancellor, and his

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determination will not be disturbed unless it is manifestly wrong. It will be granted in proportion to the wants of the party asking it, and the ability of the party who is to pay it. *Foote v. Foote*, 22 Ill. 425; *Joliff v. Joliff*, 32 id. 527.

In many of the following cases a moiety of the husband's property was given to the wife as permanent alimony: *Cook v. Cook*, 1 Eng. Ecc. R. 178; *Smith v. Smith*, id. 244; *Otway v. Otway*, id. 203; *Kirby v. Kirby*, 1 Paige Ch. 261; *Priner v. Priner*, 1 Rich. Eq. (S. C.) 282; *McCrockin v. McCrockin*, 2 B. Mon. 372.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

This was a bill for divorce, brought by William E. Robbins, in the circuit court of Lawrence county, against Martha J. Robbins. The ground for divorce alleged in the bill was desertion. The defendant put in an answer to the bill, in which she denied the desertion charged by complainant. She also filed a cross-bill, in which she charged that complainant had, without just cause, abandoned and deserted her, and refused to contribute to the support of herself and two small children, upon which ground she prayed for a divorce, and for alimony. On the hearing, the court dismissed complainant's bill, and decreed a divorce in favor of the defendant, on the allegations contained in the cross-bill.

On the question of alimony, the court found, as appears from the recitals in the decree, that the complainant was possessed of real and personal property of about the value of \$26,000, and upon this finding rendered a decree that complainant pay the defendant \$3000 in ninety days from the date of the decree, and the further sum of \$3000 in eighteen months from the date of the decree. The court further decreed that the following real estate owned by complainant, to-wit: the south-east quarter of section 5, in town 3 north, range 12 west, in Lawrence county, containing 160

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acres, be, and the title to the same is, vested in defendant, her heirs and assigns forever. The decree was made a lien on all the lands of defendant, and he was decreed to pay all costs. The complainant in the bill paid the costs of the litigation, and paid the \$3000 first ordered to be paid, and he also paid a judgment amounting in the aggregate to \$1390, which had been rendered against him before the decree was rendered, in favor of defendant's father, which was recovered for the alleged support of the defendant. After these payments had been made, and at the February term, 1878, of the circuit court of Lawrence county, complainant filed a petition asking for a modification of the decree, and a reduction of the alimony. The court, after hearing the testimony on the petition, denied the relief, and dismissed the petition. The defendant, for the purpose of reversing the decree of the circuit court, in so far as it relates to the alimony allowed, sued out this writ of error.

From the evidence heard on the petition for a reduction of the alimony, it appears that complainant's money and personal estate have been mainly expended in the payment of the \$3000 first named in the decree, and in payment of the judgment obtained by defendant's father; that in default of payment of the second installment of \$3000, a special execution issued and was levied upon 240 acres of complainant's lands, which were sold and bid off by the defendant. The redemption expired, and a deed was made to her in pursuance of the sale. It also appears that the balance of his lands are incumbered by a claim for dower and homestead on behalf of his mother, and the income derived from them is small. It also appears that the value of complainant's lands has decreased at least thirty per cent since the decree for alimony was rendered.

Sec. 18, chap. 40, Rev. Stat. 1874, entitled "Divorce," provides: "When a divorce shall be decreed, the court may make such order touching the alimony and maintenance

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of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just. * * * And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper."

Under this statute cases may arise where it would be proper and just for the court to decree a sum in gross for alimony, or a part of the husband's real estate in fee to the wife. If at the time of the marriage, or during coverture, the wife acquires money which passes into the hands of the husband, and he invests it in real estate, when she obtains a divorce it would be only justice to her to decree the title to land thus obtained to her. But where the husband has obtained no money or property through the wife, and she has contributed nothing to make the property, we are aware of no principle upon which a court would be justified in decreeing to the wife the title in fee to a portion of his lands. As was said in *Dinet v. Eigenmann*, 80 Ill. 274: "Where the wife brings nothing to the husband, and contributes little or nothing to the accumulation of her husband's fortune, she has no just claim to share in a division of property; but under the law, where the husband was in fault, he is bound to support her according to his circumstances and condition in life; and in such case it is proper that such support be afforded by an annual, half-yearly, or quarterly allowance of a fixed sum so long as she lives, or until supervening circumstances render it improper." In *Ross v. Ross*, 78 Ill. 402, it was held, that "the practice of vesting the fee of real estate in the wife by decree for alimony, although sometimes sanctioned by this court under special circumstances, is objectionable." In *Von Glahn v. Von Glahn*, 46 Ill. 134, a similar question arose, and the court held: "Where the property of the husband was accumulated by him before marriage, and the wife

Opinion of the Court.

brought no property to him upon the marriage, it would be unjust to decree to her as alimony, after decree of divorce, a large amount of the husband's property absolutely." The same principle is announced in *Keating v. Keating*, 48 Ill. 241.

In view of these authorities, can the decree for alimony in this case be sustained? It is true the evidence upon which the decree was granted has not been preserved and incorporated into the record, but from the petition presented to obtain a modification of the decree, and from the evidence introduced in support thereof, it sufficiently appears that the property and money possessed by Robbins when the decree was rendered came to him by descent from the estate of his father, and that no part of his property was derived from his wife, or came to him through her labor or exertion. Under such circumstances, while it was proper that Robbins should be decreed to pay to his wife for her support and the support of his children a reasonable sum of money as alimony upon the granting of a divorce, yet we are of opinion that it was error to decree the wife the title to the quarter section of land named in the decree.

From the evidence presented on the hearing of the petition to modify the decree, we are of opinion that the \$6000 allowed by the court as alimony when the divorce was granted was quite as large a sum as in equity should have been allowed. As to the south-east quarter of section 5, township 3 north, range 12 west, the decree will be reversed. In all other respects it will be affirmed.

Decree reversed in part and in part affirmed.

Syllabus.

HENRY H. WERNSE *et al.*

v.

WILLIAM H. HALL, Admr.

Filed at Mt. Vernon January 18, 1882.

1. JURISDICTION—as to suits against executors, etc., in Missouri—judgment void for want of jurisdiction. By a statute of Missouri it is provided that “all actions commenced against the executor or administrator” of an estate shall be considered “demands legally exhibited against such estate, from the time of serving original process on such executor or administrator.” By another statute it was shown that the probate court of Ralls county, and others, had exclusive jurisdiction “to hear and determine all suits and other proceedings against administrators, upon any demand against the estate of their testator or intestate.” A judgment was obtained in the circuit court of St. Louis against the administrator of the estate of a person who died a resident of Ralls county, in that State, in which county the administration was had, and the institution of the suit in which that judgment was obtained was claimed as an exhibition of the claim, to save it from the operation of the limitation laws of that State: *Held*, that the judgment, and the whole proceeding in the St. Louis circuit court, were void for want of jurisdiction of the subject matter, and could not be set up to avoid the limitation in a proceeding in this State to recover upon the same demand.

2. LIMITATION—action barred in another State.* Where a demand against the estate of a deceased non-resident is barred by the laws of the State where he was domiciled at the time of his death, it is equally barred in this State.

3. SAME—as to demands against estates in the State of Missouri—what is a proper exhibiting of a claim in that State. The Missouri statute provides that all demands against estates of deceased persons, not legally exhibited within two years after the granting of the first letters of administration, shall be forever barred; and further, that “any person may exhibit his demand * * * by serving upon the executor or administrator a notice in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which it is founded, and such claim shall be considered as legally exhibited, from the time of serving such notice;” but it is also provided that no claimant shall avail himself of this mode of exhibiting his demand, “unless he shall present his demand” to the proper probate court within three years after the granting of the first letters of administration: *Held*, in a proceeding in a county court in this State for an allowance of the

* See *Hyman v. Bayne*, 83 Ill. 256, as to the effect of the 20th section of the Limitation act of 1872.

Brief for the Plaintiffs in Error.

same claim, administration having been granted here, that the presentation of a void judgment of another court to the probate court, not for allowance, but for classification, within the three years, did not take the case out of the operation of the limitation.

4. **ADMINISTRATION**—*revocation of letters improperly obtained.* Where a person failing to have his claim allowed in the State of an intestate, comes to this State, and on his representation that he is a creditor of the deceased procures letters of administration here, and it is made apparent on the trial of his claim that he is no creditor, it is proper not only to disallow his claim, but also to enter an order revoking the letters of administration.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. DAVID GILLESPIE, for the plaintiffs in error, insisted that the claim was not barred by the statute of Missouri, and that it was duly presented twice within the statutory period.

That the suit in the circuit court of St. Louis county was sufficient to prevent the bar of the statute, see *Tevis v. Tevis*, Admr. 23 Mo. 256; *Williams v. Anthony*, Admr. 47 id. 299; *North v. Walker*, 2 Mo. App. Rep. 174; *Judy et al. v. Kelly*, 11 Ill. 211; *Collins v. Ayers*, 13 id. 358.

In the lifetime of Abram McPike, the right of action upon the note in question was transitory in its character. Claimants could have followed him into any other State and brought suit against him, and the fact that both parties to the contract resided in and were citizens of the same State, could not be pleaded in bar or abatement of the suit; nor could the pendency of a suit for the same thing, between the same parties, in another State, be pleaded in bar or abatement of the suit. *McJilton v. Love*, 13 Ill. 486; *Brown v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 id. 99; see, also, *Rosenthal v. Renick et al.* 44 Ill. 202.

Brief for the Defendant in Error.

Messrs. WISE & DAVIS, for the defendant in error :

This demand should, by the laws of Missouri, have been presented to the probate court of Ralls county, Missouri, within two years, and not having been presented there in that time, was rejected by the court, and this, by the law of Missouri, is an extinguishment of the debt. *Cones v. Ward's Admr.* 47 Mo. 289; *Pearce v. Calhoun*, 59 id. 274.

That which is a discharge of a contract in the government where made, is a discharge everywhere. *Powers v. Lynch*, 3 Mass. 77; Rev. Stat. Ill. p. 644, sec. 20; *Vermont State Bank v. Porter*, 5 Day, 316; *Compamp v. Bund*, 4 Dall. 419; *Hull v. Blake*, 13 Mass. 153.

The rule is, where it is the intention of the statute to convert a possession of any given length of time, or a neglect to institute proceedings according to its provisions, into a positive and unavoidable bar, the statute is a bar in the courts of every government. *Blackford v. Wade*, 17 Ves. 88; *Shelley v. Gay*, 11 Wheat. 361; *Brent v. Chapman*, 5 Cranch, 358; *McAllister v. Smith*, 17 Ill. 328; *Evans v. Anderson*, 78 id. 558.

When ancillary or auxiliary administration has been granted, no creditor outside of the ancillary administration can present his claim before the commission of ancillary administration or the court granting the same. 3 Redfield on Wills, par. 15, chap. 1; *Richards v. Dutch*, 8 Mass. 506; *Dawes v. Boyleston*, 9 id. 337; *Dawes v. Head*, 3 Pick. 128; *Hunt v. Fay*, 7 Verm. 183; *Churchill v. Bryden*, 17 id. 319.

But even if allowed by our law in some cases, as is intimated in *Bowles' Heirs v. Rowen*, 3 Gilm. 421, and in *Rosenthal, Admr. v. Renick*, 44 Ill. 207, yet it would never be permitted where administration has been granted on the estate at the domicile of the deceased, and when the claim has been presented there for allowance, as it would avail nothing to non-resident creditors, as the assets realized would be sent to the principal administrator to distribute.

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A voluntary payment by the debtor to the principal administrator, where there is no conflicting grant of domestic letters, will discharge the debtor. *Doolittle v. Lewis*, 7 Johns. Ch. 49; *Parsons v. Lyman*, 20 N. Y. 103; *Treecotheck v. Austin*, 4 Mason, 16; *Wilkins v. Ellett*, 9 Wall. 740.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This is the case of a claim filed by plaintiffs in error against the estate of Abram McPike, deceased, in the county court of Madison county, Illinois.

A promissory note, dated St. Louis, December 23, 1872, was made and signed by Leiper & Co. as makers, for the sum of \$3000, payable sixty days after date, at the Traders' Bank of St. Louis, to the order of A. McPike. This note, before maturity, was indorsed in blank by A. McPike, and sold, and became the property of the bank. It appears from the record that A. McPike was a resident of Ralls county, Missouri, and that he died intestate early in January, 1873, and before the maturity of the note, and that Henry C. McPike, a resident of Missouri, was appointed, by the county court of Ralls county, administrator of the estate of A. McPike, deceased, and received letters of administration on the 28th of January, 1873. The note was not paid at maturity, and the same was duly protested for non-payment, on February 24, 1873, and notice thereof mailed to the administrator.

This claim against the estate of Abram McPike rests upon his supposed liability as indorser of that note. His estate in Missouri is shown to have been entirely solvent. The defence interposed is a statute of Missouri, which provides that all demands against estates of deceased persons, not legally exhibited within two years after the granting of the first letters of administration, "shall be forever barred." It is insisted that this claim is barred by that statute.

The statute of Missouri provides several modes in which a claim may be thus "legally exhibited," and in addition to

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other modes, not claimed to apply in this case, the following are mentioned in the statute: "All actions commenced against the executor or administrator * * * shall be considered demands legally exhibited against such estate, from the time of serving of original process on such executor or administrator." And again: "Any person may exhibit his demand * * * by serving upon the executor or administrator a notice in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which the claim is founded, and such claim shall be considered legally exhibited from the time of serving such notice;" but it is also provided that "no claimant shall avail himself" of this latter mode of exhibiting his demand "unless he shall present his demands to the court (the proper county court), in the manner provided by law, for allowance, within three years after the granting of the first letters on the estate."

It is shown that in June, 1873, an action was begun in the circuit court of St. Louis against this administrator, upon this indorsement, and that a copy of the writ and petition was served upon him July 5, 1873, and judgment rendered against him on October 16, 1873, and it is claimed by plaintiff in error that this was a "legal exhibiting" of his demand, from the time of the service of process. It is, however, shown that by the statutes of Missouri the probate court of Ralls county (and of certain other counties specially named) had *exclusive* jurisdiction "to hear and determine all suits and other proceedings against administrators, upon any demand against the estate of their testator or intestate." This act took away expressly the jurisdiction in such matters from the circuit court of St. Louis. It was so held in *Dodson v. Scroggs*, 47 Mo. 286, and again in *Cones v. Ward*, page 289 of same volume, where it is said that parties can not, by consent, give that court jurisdiction.

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We have been referred to *Tevis v. Tevis*, 23 Mo. 256, as holding otherwise. This question did not arise in that case. The claim in that case was against an estate in course of administration in the county of St. Louis. That county is not mentioned in the act giving *exclusive* jurisdiction to the probate court of Ralls county, and certain other counties. The circuit court of St. Louis being without jurisdiction in this matter, the whole proceeding was *coram non judice*, and inoperative. There was no service of process in a judicial proceeding. It was in no sense a judicial proceeding, for the court had no jurisdiction of the subject matter.

It is contended that the claim was legally exhibited by service of a written notice of the nature and amount of the claim, and a copy of the note and indorsement on which the claim is founded, in this, that the notice of protest was such a notice; and again, in this, that the service of a copy of the petition in the circuit court of St. Louis constituted such notice. The difficulty about this position is, that even if such proceedings be regarded as such notice, the statute says no claimant can avail himself of this mode of "legally exhibiting his claim, unless he shall present the same *for allowance*, to the proper probate court, within three years of the issue of the first letters of administration." In this case no claim upon this indorsement was presented in the probate court of Ralls county until in the year 1877,—more than four years after the date of the first letters of administration. It is true, a copy of the void judgment of the circuit court of St. Louis was presented to the probate court of Ralls county, April 15, 1874, *for classification*, but it was not presented *for allowance*. No application was made to have the claim allowed, and had it been then presented for allowance, it may well be doubted whether the demand upon the judgment should be regarded as identical with the demand upon the indorsement of the note. We think this

Syllabus.

claim was barred by the laws of Missouri. If so, under our statute, the demand is barred here.

Failing to get this claim, or that upon the void judgment, allowed in the courts of Missouri, plaintiff in error came to this State, and upon his representation that he was in fact a creditor, procured letters of administration to be issued to defendant in error, as administrator of this estate, in the county of Madison, where lies real estate belonging to the estate. When it was made apparent upon the trial that plaintiff in error was not a creditor, it was proper to not only disallow the claim, but also to enter an order revoking the letters of administration, as was done in this case.

The judgment of the Appellate Court in this case is therefore affirmed.

Judgment affirmed.

LOGAN BYARS *et al.*

v.

MARY E. SPENCER *et al.*

Filed at Mt. Vernon January 18, 1882.

1. **DELIVERY OF DEED—essential to its validity.** A delivery is essential to render a deed operative, and it does not take effect until it is delivered. Without delivery it is void.

2. **SAME—what amounts to a delivery—to whom it may be made.** The delivery of a deed may be to the grantee or to his agents, and no particular form or ceremony is necessary to constitute a sufficient delivery. It may be by acts, or words, or both; but what is said or done must clearly manifest the intention of the grantor and of the grantee, that the deed shall at once become operative, to pass the title, and that the grantor shall lose all control over it.

3. Where a deed is executed and delivered to a stranger, to be delivered to the grantee, without conditions, it will be a sufficient delivery to pass the title; but the execution of a deed, and having it recorded, without the knowledge of the grantee, is not a delivery.

101	429
127	325
101	429
133	166
135	506
101	429
136	79
101	429
141	408
101	429
150	47
152	503
101	429
159	600
101	429
165	218
101	429
170	100
101	429
174	428
174	508
101	429
177	414
101	429
180	619
101	429
187	*350
101	429
205	*369
205	*370

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4. When the facts show that the grantor did not intend to lose control over the deed, and he still continues to have power over the title without the consent of the grantee, there is not such a delivery as the law requires to render it a deed, and it can not pass title.

5. So, where a father made and acknowledged a deed to his two minor children, but retained it until his death, and declined to have it recorded, on the express ground that he would thereby place the title beyond his power or control, and expressed an intention, after he had made and acknowledged the deed, to sell the land if he could get a certain price, and in pursuance of that intention did offer to sell the land, it was *held*, that the deed was inoperative for want of a delivery.

6. JUDICIAL SALE—*party can not impeach, and still retain the proceeds.* A party can not impeach a sale of his interest in land, under a proceeding by his co-tenants, when he has received and retains his share of the proceeds, on any ground, either for want of jurisdiction in the court ordering the sale, or for any irregularity in the sale. He who seeks equity must do equity. Before he can be heard to deny the validity of the sale he should restore, or offer to return, the money so received by him.

WRIT OF ERROR to the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

MESSRS. BARR & LEMMA, and Mr. G. W. SMITH, for the plaintiffs in error.

Mr. ANDREW D. DUFF, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that one Thomas Whitson, of Jackson county, in this State, was, in his lifetime, the owner of one hundred and seventy-four acres of land, situated in that county; that the land was improved, and he resided on the same many years before his death. He was twice married, and was the father of eleven children, nine by the first and two by the latter wife. He survived both, and the children by the first wife, being grown, had left him, and he remained on the farm with complainants, the two children by the latter wife. They were minors, the one eight and the other ten years of age. He made, executed and acknowledged a deed conveying this land to them. The deed was made in July, 1864,

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but was never delivered to the grantees, or to any person for them, nor was it recorded, nor did it ever pass out of the possession of the grantor or from under his control. At the time he made it he took it, after acknowledging it, to his house, and placed it in a drawer of a bureau with other papers, where it remained till the time of his death. He went to Worthen, a justice of the peace of Jackson county, and said to him he wished to convey these lands to his two minor daughters. He said to Worthen: "You know that I have given to my children by a former wife, that are grown and have left me, a good farm. These little ones have yet to be raised. I think it nothing but right that they should be provided for, making it equal with the others." The deed was made and acknowledged at the time this conversation occurred.

Subsequently, Worthen, in a conversation with Whitson, suggested to him that he should have the deed delivered and recorded. Whitson replied, that he, being the natural guardian,—the father of the children,—was the proper person to hold it; and with regard to recording it, he had an objection to its being recorded at that time, because if he could sell the land for \$6000 he would divide the proceeds between the two children, but if the deed was on record he could not sell it, because of the deed being recorded; nor could the girls sell it, because they were minors. If the deed remained, then, unrecorded at his death, it would show his intention,—what he would do,—and right would be done. Whitson said, in conversation with Worthen's wife, that in value more was given to these two children than to the others; but he considered the matter in the light of the fact that the older children were raised, and "doing for themselves," but these two were to be raised, and added, he did not expect to live to raise them. He, but a short time before his death, offered to sell the land, and on several occasions called it his. Letters of administration were granted to Benj. B. Whitson, who

Opinion of the Court.

took possession of the personal effects of deceased, and closed up and settled the affairs of the estate. Complainants charge that the administrator obtained possession of the deed, and destroyed or suppressed it, and there is some evidence that the deed came to his hands after the death of his father; but he denies it in his sworn answer, and deposition, and denies ever having seen it, or of having any knowledge that it ever existed.

Izir Byars, one of the sons-in-law of Thomas, after the death of the latter, purchased of a number of the heirs their claims to or interest in the property, representing nearly one-half. He thereupon filed a bill against the heirs who had not sold, for a partition. On the hearing the court appointed commissioners to make partition, but they reported that the land was not susceptible of division without manifest injury to the parties in interest. The court approved the report, and thereupon decreed the sale of the land, and decreed that the master in chancery make the sale, after specified notice, etc. The sale was made to the Mount Carbon Coal and Railroad Company, now the Grand Tower Mining, Manufacturing and Transportation Company, for the sum of \$7852.95, which was distributed and paid to the several parties to the bill, according to their interests as found by the court, the complainants receiving their share, under the order of the court.

In the view we take of the case these are the material facts. Other facts are averred, and evidence was heard on them, but we regard them immaterial to the decision of the case. The bill prayed that the title of complainants might be established and confirmed; that the proceedings for partition might be set aside as void, and that all deeds from the heirs to Izir Byars be held and declared void as to them. On a hearing the circuit court decreed the relief asked, and the defendants below bring the record to this court on error, and urge a reversal.

Opinion of the Court.

The first question we propose to consider is, whether the deed executed by Thomas Whitson ever became operative to pass the title to the grantees named in the deed,—whether there was such a delivery as passed the title to the land from him to them. It is conceded that to have that effect there must have been a delivery. On the one side it is claimed there was, and on the other it is insisted there was no delivery. The question as to what acts are necessary to constitute a sufficient delivery to render a deed operative and to pass the title to the land, has been the subject of much discussion in this court. It is held that a delivery is essential to render a deed operative, and it does not take effect until it is delivered. *Skinner v. Baker*, 79 Ill. 496; *Blake v. Fash*, 44 id. 302. It may be delivered to the grantee or to his agent. Nor is any particular form or ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative, to pass the title to the land conveyed, and that the grantor loses all control over it. *Bryan v. Wash*, 2 Gilm. 557. It has been held that where a deed is executed and delivered to even a stranger, to be delivered to the grantee, without conditions, it will be a sufficient delivery to pass the title. *Rawson v. Fox*, 65 Ill. 200. But the execution of a deed, and having it placed on record, without the knowledge of the grantee, is not a delivery. *Kingsbury v. Burnside*, 58 Ill. 310; *Krebaum v. Cordell*, 63 id. 23. But in such a case the subsequent assent of the grantee will be sufficient. *Dale v. Lincoln*, 62 Ill. 22.

In *Gunnell v. Cockerill*, 79 Ill. 79, it was held, that any act which clearly manifests an intention of the grantor and the person to whom it is delivered that the deed shall presently take effect and become operative, and the grantor loses all control over it, is a sufficient delivery. In all cases the inten-

Opinion of the Court.

tion of the grantor to part with its possession and control enters largely into the question of delivery. When the facts show that the grantor did not intend to lose control of the deed, and still continues to have power over the title without the consent of the grantee, there is not such a delivery as the law requires to render it a deed, and it can not pass title. In this case Thomas Whitson, so far from manifesting such an intention, on the contrary retained the deed, and declined to have it recorded, on the express ground that he would thereby place the title beyond his power to control it. He also expressed the intention, after he had made and acknowledged it, to sell the land if he could do so at \$6000, and in pursuance of that intention he did offer to sell it. Instead of his doing or saying anything indicating an intention to deliver the deed, his declarations and acts clearly prove that he did not intend to deliver the deed or place the title in the grantees. Under none of the cases referred to can it be held there was a delivery, but they all hold there could not, under the facts of this case, have been a delivery, and there being no delivery the complainants took no title under the deed.

It is, however, insisted by defendants in error that the case of *Dale v. Lincoln*, *supra*, is in fact and principle so nearly like this that it requires an affirmance. There is a broad distinction between that and this case. There, the grantor had the deed recorded, and all of his acts showed he intended the title to pass to the grantee; nor did he do or say anything that showed an intention to retain any control over it while he was in the army. Again, it was a delivery in escrow, and he directed that it should take effect on his death, if he should die in the army. The grantee having sold the land after the death of the grantor in the army, it was by a majority of the court held there was a sufficient delivery to pass the title, in equity, the grantee being his wife. Here, the deed was not recorded, and was not, for the express purpose of retaining the power to control it by the grantor.

Opinion of the Court.

The case of *Reed v. Douthit*, 62 Ill. 348, is referred to as announcing rules that govern this case. In that case a father signed, sealed and acknowledged a deed to his minor son, saying he intended it as a provision for the son. He spoke of the land as his son's, who rented a portion of the land in the lifetime of the father, and exercised other acts of ownership over the land, and had the deed recorded after the death of his father, and had possession of the deed, and this was held to be evidence of the delivery of the deed, and cast the *onus* of proving a want of delivery on the parties questioning the grantee's title. There was no direct proof of a delivery of the deed, but the grantee had possession of it after his father's death. Those claiming to be tenants in common insisted that he was required to prove a delivery by specific evidence, but it was held that a delivery would be presumed under the circumstances appearing in evidence. But in this case there is evidence that the deed was not delivered, nor was it intended to be delivered. This fact clearly distinguishes this from that case.

Defendants in error refer to *Stinson v. Anderson*, 96 Ill. 373. In that case the father made and acknowledged a deed to his three minor children, and left it with the justice of the peace before whom it was acknowledged, requesting him to keep it for the grantor, saying, if he wanted it he would call for it, but if he died that he deliver it to the grantees. The grantor afterwards mortgaged the same land to a third party, and it was held there was not a delivery to pass the title. There, as here, the grantor retained control over the deed, and it was held there was no delivery, and no title passed. In this case it clearly appears that it was the intention of Thomas Whitson to provide for these minor children by giving them this land, or its proceeds, but he failed to do so by omitting the observance of essential requirements of the law to effectuate the purpose. He seemed to rely on the sense of justice of his children by his first wife, and their supposed respect for

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his wishes, to fulfill and carry them into effect. He said to Worthen, if the deed remained there unrecorded at his death, it would show his intention as to what he would do, and right would be done. But he misplaced his confidence, as his children by the former marriage have failed to carry out his manifest intention. His intention is clear, but he failed to execute it. Complainants, therefore, took nothing under this deed, but simply by his death inherit in common with the other heirs.

Complainants ask that the proceedings in the partition suit be vacated and set aside, because they are void. The record discloses the fact that this land was sold, under the decree in partition, for \$7852.95, and the proof shows the money was distributed among the heirs of Thomas Whitson, deceased, and that complainants received their proportionate share of the money. This they have not restored or offered to return to the corporation. It would be manifestly unjust, and highly opposed to every principle of equity, to permit them to set aside the sale and recover the property and also to hold the money. The maxim is, that the party who seeks equity must do equity. Complainants have not done equity, nor have they offered to do so, by returning the money. The principles announced in the cases of *Penn v. Hiesey*, 19 Ill. 295, and *Walker v. Mulvean*, 76 Ill. 18, are conclusive on this question. In the former of these cases the guardian had sold the property of the ward under a license from the court, but the sale was never approved. It appeared the guardian applied a portion of the proceeds of the sale to the purchase of other lands, and accounted for the balance on a final settlement with the ward. Suit was brought to recover the land by the ward, and defendant, who claimed under the guardian's sale, brought a suit to enjoin the suit at law, and it was held that the injunction was properly granted restraining the prosecution of the suit. In the latter of these cases land of minors was sold under a decree in partition, and

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after coming of age they received their just proportion of the money with a knowledge of the facts. It was held they could not assert title to the land, and were prevented from denying the validity of the sale, on any ground, either as to the jurisdiction of the court or for any irregularity of the sale.

The decree of the court below is reversed, and the cause remanded.

Decree reversed.

Mr. JUSTICE MULKEY having been once consulted in this case, took no part in its decision.

LOUISA HARTMAN *et al.*

v.

CHARLES SCHULTZ *et al.*

Filed at Mt. Vernon January 18, 1882.

1. HOMESTEAD—as to the character of the exemption. Under the Homestead law of 1873, “all right and title” which the head of the family has in the premises which constitute his homestead, is exempted from forced sale for the payment of his debts, or other purposes. It is not the mere right of occupancy, but it is the lot or ground occupied as a residence that is exempted.

2. Where the homestead premises do not exceed in value \$1000, there can be no valid sale of the property itself on execution or decree for the payment of debts or other purposes, and this exemption, on the death of the householder, is continued in force as to his widow and children, precisely as held by him.

3. SAME—*exempt from administrator's sale.* No sale can be rightfully made of the homestead by the administrator of the deceased householder to pay his debts, when the property does not exceed in value \$1000, until the exemption in favor of the widow and minor children has been in some mode terminated; and if such a sale is made, a court of equity has the power to set the same aside at the instance of the homestead occupant. The homestead, when not exceeding \$1000 in value, can not even be sold subject to the homestead right.

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f189 335

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194 43

195 411

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107a 419

Briefs of Counsel.

WRIT OF ERROR to the Circuit Court of Randolph county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. GORDON & HOOD, for the plaintiffs in error:

The homestead exemption is declared by statute. Laws of 1872, sec. 1, p. 478; Rev. Stat. 1874, ch. 52, sec. 1. Continues after death of householder to the widow and children until the majority of the youngest child. Rev. Stat. 1874, ch. 5, sec. 2; *Wolf v. Ogden*, 66 Ill. 224; *Vanzant v. Vanzant*, 23 id. 536. Distinction between voluntary conveyance and forced sale. *Hartwell v. McDonald*, 69 Ill. 293. Sale is void. *Haworth v. Davis*, 67 Ill. 301; *Bliss v. Clark*, 39 id. 590. A mortgage on homestead premises not exceeding \$1000 in value, without a release of the homestead right, creates no lien. *Asher v. Mitchell*, 92 Ill. 480.

Sale of homestead by administrator to pay debts is void in law. Rorer on Judicial Sales, sec. 495.

Complainants have a right to file original bill, and assert their homestead rights, and have the sale set aside. *Moors et ux. v. Dixon*, 35 Ill. 208; *Moore et ux. v. Titman*, 33 id. 358; *Hubbell et al. v. Canaday*, 58 id. 425; *Allen et al. v. Hawley et ux.* 66 id. 164.

Messrs. JOHNSON & HORNER, for the defendants in error:

The homestead right that devolves upon the widow and minor children is essentially different from that of the owner of the fee during his lifetime. In the widow, and especially in the minor children, it is much less in value than in the deceased, and \$1000 is not, and can not be, regarded as the value of such interest. *Merritt v. Merritt*, 97 Ill. 249; *Walters v. The People*, 18 id. 199.

The \$1000 simply measures the value of the land to which the right attaches, and this is true both of the householder during life, and of his widow and children after his death. *Merritt v. Merritt*, 97 Ill. 249; Rev. Stat. 1874, p. 428, sec. 44, and amendment of 1875, Laws of 1875, p. 75.

Opinion of the Court.

The "marked distinction" between forced and voluntary conveyances grows out of the policy of the law to permit the owner to sell his household and re-invest in another. Rev. Stat. 1874, p. 498, sec. 6; *Merritt v. Merritt*, 97 Ill. 249; *Hartwell v. McDonald*, 69 id. 297.

Hence a voluntary conveyance passes the fee subject to the homestead, if not released. *McDonald v. Crandall*, 43 Ill. 231; *Asher v. Mitchell*, 92 id. 480, and citations.

A judgment or decree does not create a lien on the homestead, and a sale under either is therefore void as to the homestead. But the judgments and decrees here referred to are such as, under the statute, would create a lien but for the Homestead act, of which class a decree to sell land to pay debts of deceased is not one. *Green v. Marks*, 25 Ill. 221.

The policy of the Homestead act in regard to the owner of the fee—the ancestor—as outlined above, and as indicated in sec. 6, Rev. Stat. 1874, p. 498, does not apply after death, and the homestead may or may not be set off in the proceeding to sell land to pay debts. (Laws of 1875, p. 75.) And in either case the fee passes. See *McCormick v. Kimmel*, 4 Bradw. 121.

Mr. Justice Scott delivered the opinion of the Court:

The facts in this case appear by admission on demurrer to the bill. Prior to his death, which occurred on the 11th day of April, 1873, William H. Bruggeman was the owner in fee of the lands in controversy, and resided thereon, up to the time of his death, with his family, as his homestead. Conrad Welge was appointed administrator, and under an order of the county court obtained leave to sell the real estate of the intestate to pay debts. The administrator sold the premises to Christian Brockmyer, and made him a deed therefor in the usual form of administrators' deeds. Afterwards Christian Brockmyer,—his wife joining with him in the execution

Opinion of the Court.

of the deed,—conveyed the premises by trust deed to Henry Schultz, to secure the payment of a note to Charles Schultz. Default having been made in the payment of the indebtedness secured, the premises were sold by the trustee, under the power contained in the trust deed, and at his sale Charles Schultz became the purchaser. The bill in this case was exhibited by the widow and minor children of the intestate, to set aside the administrator's deed to Brockmyer, and all subsequent deeds conveying the property to Charles Schultz, on the ground the premises had been the homestead of the intestate, and since his death the homestead of his widow and minor children, and for that reason the administrator's sale of the premises to pay debts was void. It is alleged in the bill, the premises that constituted the homestead of the intestate, and since his death of his widow and minor children, are not worth exceeding \$1000, and are so situated a division of the same could be made without injury to the rights of any one interested. Of course the demurrer to the bill admits these allegations to be true, and for the purposes of this decision it will be assumed the premises do not exceed in value \$1000, and are susceptible of division without injury to parties interested, should a division become expedient or necessary for any purpose.

The decision of the case involves a construction of the Homestead law in some of its provisions, and presents a question not heretofore considered by this court in the exact form presented by this record.

Section 1 of the Homestead act, in force July 1, 1873, declares, "that every householder having a family, shall be entitled to an estate of homestead, to the extent in value of \$1000, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution sale for the payment of his

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debts or other purposes, and from the laws of conveyance, descent and devise," except as in the act thereafter provided. It is difficult to conceive how the exemption of the homestead from involuntary sale, under judicial process, could be more clearly expressed than it is in this section of the statute. It must be understood to mean what is so plainly expressed,—that is, that "all right and title" which the head of the family has in the premises which constitute his homestead, shall be exempt from forced sale for the payment of his debts or other purposes. This section of the Homestead act received a construction in *Hartwell v. McDonald*, 69 Ill. 293, where it is said: "It is not the mere homestead right of occupancy which is exempted from levy and forced sale, but it is the lot of ground occupied as a residence." The context is in harmony with this view, and affords evidence it is the land itself which constitutes the homestead, and not the mere right of occupancy, that is exempt from levy and forced sale. Section 9 absolutely forbids any sale of the homestead on execution or decree, unless a sum greater than \$1000 is bid therefor. Should no greater sum be bid, the decree may be modified or the execution released as for want of property. It is not necessary the party having a homestead in premises should own the same in fee simple, to entitle him to the exemption provided by the statute. It is sufficient if he is rightly possessed of the premises, by lease or otherwise. It is plain, therefore, where the homestead premises do not exceed in value \$1000 there can be no valid sale of the property itself, on execution or decree, or for the payment of debts or other purposes. This court has never recognized in any of its previous decisions the doctrine sometimes insisted upon, that there can be a sale of the property, subject to the right of occupancy by the party entitled to a homestead. Even a sale of the premises, where the homestead exceeds in value \$1000, is invalid unless the provisions of the statute in regard to assigning homestead, and for a sale where the

Opinion of the Court.

premises are not susceptible of division, have been substantially complied with.

Keeping in view this definition of what is exempt from levy and forced sale, in favor of the householder having a homestead on which he resides with his family, a clearer understanding will be more readily obtained of the second section of the Homestead act, which has more immediate application to the case in hand. That section provides: "Such exemption shall continue after the death of such householder for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest child becomes twenty-one years of age." What exemption is it that is continued in favor of the husband or wife surviving, or of the children? But one answer can be given. It is the exemption from levy and forced sale, for the payment of debts or other purposes, of the homestead, where the property does not exceed in value \$1000, that existed in favor of the householder himself. The language employed will bear no other construction, consistently with the common understanding of the words used to express the legislative intention. Sanction is given to this reading of this section of the Homestead act, by the reasoning in *Wolf v. Ogden*, 66 Ill. 224, *Hartwell v. McDonald*, *supra*, and in *Bursen v. Goodspeed*, 60 Ill. 277. Although the exact question was not involved in either case, it seems to have been assumed, or taken for granted, there could be no sale of the homestead property by the administrator of the householder, for the payment of the debts of the estate, or for other purposes, where it did not exceed in value \$1000, until the exemption continued in favor of the widow and minor children was terminated in some way known to the law. In *Wolf v. Ogden*, in respect to the lien of the creditors upon the estate of the intestate, it was said, if the premises were worth less than \$1000 it would not attach until the termination of the homestead interest. Cogent reasons suggest

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themselves in favor of this construction. Should a sale be made before the termination of the homestead estate, it might subject the heir entitled to the remainder to most ruinous sacrifice of the property. Examples readily occur. The widow or husband in whose favor the homestead is continued, being young, a purchaser buying the property at administrator's sale would consider the probable duration of the estate in such party. The longer it would probably endure, the less would be expected to be bid. Should the estate of homestead be suddenly terminated, by death or abandonment, the purchaser would obtain a perfect title to the property, subject to no burden, at vastly less than its real value, to the great prejudice of the creditors of the estate of the householder, or the parties entitled to the remainder. It was surely never intended property should be thus needlessly sacrificed, and any construction of the Homestead act that would lead to such a result would be mischievous in the highest degree. Plainly, no sale can be rightfully made of the homestead, by the administrator, to pay debts, where the property does not exceed in value \$1000, until the exemption in favor of the widow and minor children has in some mode terminated. In *Kingman v. Higgins*, 100 Ill. 319, analogous questions are discussed, and that case is an authority exactly in point, sustaining the views here expressed. Where the homestead exceeds \$1000 in value, the statute directs how a sale of the property may be made. *Hotchkiss v. Brooks*, 93 Ill. 392, and *Merritt v. Merritt*, 97 id. 249, discuss the value of the homestead of the widow and minor children where the property exceeds \$1000 in value, and is sold under judicial process, and hence illustrate no phase of the case under consideration.

In *Conklin v. Foster*, 57 Ill. 104, this court entertained a bill to set aside a sale of homestead premises made in violation of the provisions of the statute, at the instance of the party entitled to the occupancy, and in other cases the en-

Syllabus. Opinion of the Court.

joining of the making of judicial sales of the homestead has been sustained. No doubt is entertained as to the power of a court of equity to afford the relief asked for by the homestead occupant in this case.

The decree will be reversed, and the cause remanded for further proceedings conforming to this opinion.

Decree reversed.

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101	444
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199	96

JAMES GALBRAITH

v.

JOSEPH PLASTERS.

Filed at Mt. Vernon January 18, 1882.

1. *APPEAL—whether freehold is involved.* No appeal lies directly from the circuit court to this court, from an order dismissing a bill seeking to set aside a sale of land on execution, on the ground of its being the complainant's homestead, as no freehold is involved in the suit.

2. It is not enough that the freehold be affected, it must be involved,—that is, directly the subject of the litigation,—to give the Supreme Court jurisdiction by appeal directly from the circuit court.

APPEAL from the Circuit Court of Franklin county; the Hon. D. M. BROWNING, Judge, presiding.

Messrs. YOUNGBLOOD & MOYERS, for the appellant.

Mr. W. H. WILLIAMS, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Certain real estate of the appellant was sold by the sheriff of Franklin county, by virtue of an execution, and bid in by appellee, to whom the sheriff gave a certificate of purchase, showing that if the property should not be redeemed, according to law, within fifteen months from the day of sale, he would be

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entitled to a deed. On the 7th day of April, 1881 (less than six months from the day of sale), the present bill was filed in the circuit court of Franklin county, to set aside the sale, on the ground that the property was exempt from sale by virtue of the provisions of the law relating to the "Exemption of Homesteads." The circuit court, on hearing, dismissed the bill for want of equity, and the present appeal is prosecuted from that decree directly to this court.

The appeal must be dismissed. It is very clear no freehold is involved in the present litigation, and there is no other ground, apparent to us, upon which it could be pretended the right of appeal, directly from the circuit court to this court, exists. Until appellee obtains a deed, he can not claim the freehold, and until the expiration of the time of redemption, appellant can, at any moment, remove the lien of appellee's claim by simply paying the redemption money. Should appellant get all he prays by his bill, it would not be a freehold, but simply the removal of a lien which he, by his negligence, might suffer to ripen, in process of time, into a freehold; and by having the prayer of his bill refused he loses no freehold, but simply fails to have this lien removed. See *Gage v. Busse*, 94 Ill. 590; *Hutchinson v. Howe*, 100 id. 11. It is not enough that the freehold be affected, it must be involved,—that is, directly the subject of the litigation,—to give us jurisdiction by appeal from the circuit court.

The appeal will be dismissed, with leave to appellant to withdraw his record, abstracts and briefs, if he so desires.

Appeal dismissed.

THE WIGGINS FERRY COMPANY

v.

THE PEOPLE *ex rel.* Herman G. Weber, Collector, etc.*Filed at Mt. Vernon January 18, 1882.*

1. RES JUDICATA—in Appellate Court as to errors not assigned. An affirmance of a judgment in the Appellate Court on appeal or writ of error, where the appellee or defendant in error files no cross-errors, is not conclusive on the latter, and he may, on writ of error from this court, assign errors, and have the original judgment reversed.

2. PRACTICE—whether an exception is necessary. Where an error appears in the record proper, as made up by the clerk, no exception to the judgment of the court is necessary; but if the ruling is upon matters which can only appear in the record by a bill of exceptions, it must be shown that the erroneous ruling was excepted to at the time.

3. So where the delinquent list filed by a collector on application for judgment for taxes, shows that a greater rate of city taxes has been levied against the property than is allowed by the city charter, no exception is necessary to the judgment of the county court for such excessive rate of taxes. It is sufficient that such defence was made in the written objections. The delinquent list is in the nature of a pleading, serving the office of a declaration in the case, stating what is the cause of action.

WRIT OF ERROR to the County Court of St. Clair county;
the Hon. FREDERICK H. PIEPER, Judge, presiding.

Mr. H. P. BUXTON, for the plaintiff in error:

This case is submitted on the authority of *Weber, Collector, v. Traubel*, 95 Ill. 427, in which this court held the city of East St. Louis is limited by its charter to a levy of one per cent on the valuation of property. No bill of exceptions was necessary, as the error complained of appears in the delinquent list and the objections filed by plaintiff in error. The rate of the city tax appears in such list.

Mr. J. M. FREELS, for the defendant in error:

On writ of error to the Appellate Court, brought by the defendant, this judgment was affirmed. Plaintiff in error in

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Brief for the Defendant in Error.

that court failed to assign cross-errors, and is concluded by the judgment of the Appellate Court. The question is *res judicata*, and this defendant in error has pleaded. *Grace-land Cemetery Co. v. People*, 92 Ill. 622; 6 Wait's Actions and Defences, 769, 770.

When a former adjudication is pleaded as an estoppel, it is conclusive as a bar. Abbott on Trial and Evidence, 824.

This judgment being affirmed in the Appellate Court, there was no remanding order, and in such case none is required. Statutes of 1878, p. 982, sec. 83; *Kern v. Strasberger*, 71 Ill. 303; *Carmichael v. Vandebur*, 51 Iowa, 226.

A judgment of affirmance is conclusive while it remains unreversed. *Voorhees v. Bank of United States*, 10 Pet. 449. And this final judgment in the Appellate Court is not open to further proceedings in the county court. *Abrams v. Lee*, 14 Ill. 167.

That plaintiff in error, by failing to file cross-errors in the Appellate Court, will not be allowed to assign error in this court on appeal or error, see *Diversy v. Johnson*, 93 Ill. 548; *Johnson v. Maples*, 49 id. 105; *People ex rel. v. Brislin*, 80 id. 424; *Elliott v. Mitchell*, 28 Texas, 105; *White v. Allen*, 3 Ind. 561; *Nutter v. Junction*, 13 id. 479; *McRae v. Bank of Columbus*, 1 Ala. 578.

As to the conclusive effect of a judgment until reversed, as to all matters that might have been decided, see 6 Wait's Actions and Defences, 786; *Cromwell v. County of Sal*, 94 U. S. 352; *Perry et al. v. McLindon*, 62 Ga. 598; *Green v. Weaver*, 63 id. 302; *Sheldon et al. v. Patterson*, 55 Ill. 510; *Mabry v. Henry*, 83 N. C. 298; *Rogers v. Higgins et al.* 57 Ill. 247; Freeman on Judgments, sec. 323.

The record in this case nowhere shows an exception taken by the plaintiff in error to the judgment of the county court, and without which it can assign no error to said judgment in this court. *Parsons v. Evans*, 17 Ill. 238; *The David Force Manf. Co. v. Horton*, 74 id. 310; *Pottle v. McWarter*,

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13 id. 455; *Case v. Fogg*, 46 Mo. 44; *Jameson v. Jefferson County*, 45 id. 332; *Swearingen v. Newman*, Admr. 4 id. 456; *St. Louis v. Milligan*, 18 id. 181; *London v. King*, 22 id. 337; *Smith v. Phillips*, 33 id. 43.

A party, to avail himself of an exception to a decision of the court, must except at the time the decision is made, and the bill must affirmatively show that the exception was taken at that time, or it will not be considered. *Burkett v. Bond*, 12 Ill. 87; *Sullivan v. Dollins*, 13 id. 85; *Leigh v. Hodges*, 3 Seam. 17; *Charlesworth v. Williams*, 16 id. 338; *Harbaugh v. Monmouth*, 74 id. 370; *Duncan v. Pope*, 47 Ga. 445.

An error in the ruling of the court is waived by a failure to except thereto. *York v. Clements*, 44 Iowa, 95; *McMillan v. Gilt Edge Cheese Factory*, 23 Mich. 545; *Lynch v. Jennings*, 43 Ind. 276.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The plea here filed in this court of a former adjudication in the Appellate Court, is the same as the first plea in the case of *Page & Buckland v. The People*, 99 Ill. 418, and for the reasons there given the demurrer to the plea is sustained.

The only error assigned upon the record is, that the county court erred in rendering judgment for more than ten mills on the dollar of the equalized valuation.

In *Weber v. Traubel*, 95 Ill. 428, we held that such a judgment, as applied to taxation in East St. Louis, was erroneous,—that that city was limited by its charter to a levy of one per cent on the valuation of property.

It is objected that this question is not properly before us, because there was no exception taken in the county court to the judgment of that court, citing *Parsons v. Evans*, 17 Ill. 238, and other cases in this court, as so holding. But the rule is, where an error appears in the record proper, as made up by the clerk, no exception to the judgment of the court is necessary. *Randolph v. Emerick*, 13 Ill. 344.

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The cases cited were where the ruling was upon matters which did not appear in the record except as they were introduced into it by a bill of exceptions, which was necessary for that purpose; and in such cases it must appear that the erroneous ruling was excepted to at the time it was made. In the present case, the matter upon which the judgment was pronounced appears in the record, without the necessity of its being brought into the record by a bill of exceptions. The delinquent list of lands filed by the collector, upon which he asked judgment, showed the valuation of the property and the amount of the city tax. From this it appears that the rate per cent of taxation levied by the city is twenty-two mills on the dollar. This delinquent list is in the nature of a pleading in the case, serving the office of the declaration in a case, stating what is the cause of action.

An objection in writing was filed by defendant that the per centum of taxation assessed against the property for city purposes was greater than is allowed by the charter of the city. The record of the judgment of the county court states in terms that judgment is refused for eight twenty-seconds, and given for fourteen twenty-seconds of the city taxes. We think it appears from the record, outside of the bill of exceptions, that the city tax levied was twenty-two mills on the dollar of the valuation, and hence that there was no necessity of excepting to the judgment in order to assign error upon it.

The judgment being for fourteen mills on the dollar, which is four mills in excess of the limitation of the city charter, is erroneous, and must be reversed, and the cause remanded.

Judgment reversed.

HENRY WINTER

v.

NAPOLEON B. THISTLEWOOD.

Filed at Mt. Vernon January 18, 1882.

CONTESTED ELECTION—*of mayor of city—county court has jurisdiction.*
The county court has jurisdiction to hear and determine contested elections of mayors of cities organized under the general law relating to cities and villages. The common council has no such jurisdiction, possessing no judicial powers.

APPEAL from the County Court of Alexander county; the
Hon. REUBEN S. YOCUM, Judge, presiding.

MESSRS. MULKEY & LEEK, for the appellant.

MESSRS. GREEN & GILBERT, for the appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a proceeding, commenced by a statement in writing, in the form of a bill in chancery, filed in the county court of Alexander county, to contest an election to the office of mayor of the city of Cairo. That court sustained a demurrer to the petition on the ground of a want of jurisdiction, and that ruling presents the only question upon which we are required to pass.

The petition alleges that the city of Cairo is incorporated under the general law in relation to the incorporation of cities and villages, and this is, of course, admitted by the demurrer. The 49th section (sec. 2, art. 4.) of that law enacts, that "at the general election held in 1877, and biennially thereafter, a mayor, a city clerk, a city attorney, and a city treasurer shall be elected in each city." * * * And the 57th section (sec. 10, art. 4) enacts, that "the manner of conducting and voting at elections to be held under this act, and contesting the same, the keeping of poll lists and canvassing

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the votes, shall be the same, as nearly as may be, as in the case of the election of county officers under the general laws of this State." * * * What, then, is the mode provided by general law for contesting elections of county officers?

By section 97, chap. 46, Rev. Stat. 1874, entitled "Elections," the circuit court is empowered "to hear and determine contests of the election of the judges of the county courts of their counties, and in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county." And by section 98 of the same chapter, "the county court shall hear and determine contests of election of all other county, township and precinct officers, and all other officers for the contesting of whose election no provision is made." And section 113 of the same chapter provides, that "the person desiring to contest such election shall, within thirty days after the person whose election is contested is declared elected, file with the clerk of the proper court a statement, in writing, setting forth the points on which he will contest the election, which statement shall be verified by affidavit in the same manner as bills in chancery may be verified."

It would, therefore, seem beyond controversy,—First, that the election of mayor of the city of Cairo was held under the general law relating to the incorporation of cities, villages, etc.; second, that being so held, the manner of "contesting the same" "shall be the same, as nearly as may be, as in the case of the election of county officers under the general laws of this State;" third, that since the only county office to be contested in the circuit court is that of county judge, and the county court "shall hear and determine contests of election of all other county officers," etc., the contest is properly made in the county court; and fourth, that the statement in writing was sufficient to give that court jurisdiction, unless some provision can be found in the statute showing, clearly, a contrary intention.

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Such a provision, it is contended, is found in section 6, art. 3, of the general law providing for the incorporation of cities, villages, etc., which declares that "the city council shall be judge of the election and qualification of its own members." The argument is, section 1 of that article provides that the city council shall consist of the mayor and aldermen, and the right to judge of the election and qualification of its own members is not restricted, but is general, and includes all,—the mayor as well as the aldermen. Suppose this be conceded, to what extent will it affect the present question?

The right conferred upon the council is only to judge of the election and qualification of its own members,—simply to determine who shall be a part of it and participate in its deliberations. No judicial powers are conferred upon it, and when it has denied one, claiming to be a member, the privilege of participating in its proceedings, it has done all that there is the slightest pretence it has any authority for doing.

But the mayor is the chief executive officer of the city, and, independently of the council, in that capacity may exercise, within the city limits, the powers conferred upon sheriffs to suppress disorder and keep the peace. (Section 8, art. 2.) He may release any person imprisoned for a violation of any city ordinance. (Section 9, art. 2.) He shall take care that the laws and ordinances are faithfully executed. (Section 10, art. 2.) He shall have power, at all times, to examine and inspect the books, records and papers of an agent, employé or officer of the city. (Section 11, art. 2.) He shall annually, and from time to time, give the council information relative to the affairs of the city, etc. (Section 12, art. 2.) He shall have power, when necessary, to call on every male inhabitant of the city over the age of eighteen years to aid in enforcing the laws and ordinances, and to call out the militia to aid in suppressing riots, etc. (Section 13, art. 2.) The mayor, or any three aldermen, may call

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special meetings of the city council. (Section 17, art. 3.) And he may exercise a veto power in regard to ordinances. (Section 18, art. 3.) In none of these respects does the city council have any control over him, and in all of them he acts entirely independently of the common council, and without the slightest reference to the question of his membership in that board. Indeed, except in case of a tie in the votes of the aldermen, when he is required to give the casting vote, his duties as a member of the council are more formal than substantial, being limited to merely presiding. It is to be borne in mind authority is not conferred upon the common council to be the judge of the election and qualification of the mayor, as it is to be presumed would have been if such had been intended, but simply of its own members.

We are clearly of opinion whatever power the common council may exercise in regard to the election and qualification of a mayor, as affecting his membership of the council, it has no power to go beyond the letter of the statute and determine a contest between two rival candidates for the office of mayor. Even if it be conceded, which we do not, that the council may lawfully decline to allow the mayor to preside over its deliberations, and give the casting vote in case of a tie, on the ground that he is not elected and qualified, its power extends no further. In such case the power is given to the body to enable it to protect and purify itself, but neither principle nor analogy extends it any further.

Incidentally, we have heretofore recognized authority in the county court to hear and determine contests of this character. *Brush v. Lemma*, 77 Ill. 496; *Young v. Adam*, 74 id. 480; *Linegar v. Rittenhouse*, 94 id. 208. In the last named case we held that the council was the sole tribunal for determining a contest for the office of alderman, solely because such we construed to be the reading of the statute. But the duties of that office are purely legislative. The alderman can act only as an integral part of the council. And it was

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there said, that under the 57th section (section 10, art. 4,) of the general law for the incorporation of cities and villages the county court has jurisdiction to hear and determine cases of contested elections for the office of mayor.

The decree of the county court is reversed, and the cause remanded, with directions to that court to overrule the demurrer, and allow answer to be filed.

Decree reversed.

ISABELLE V. SIMMONS

v.

JOHN W. STUM.

Filed at Mt. Vernon January 18, 1882.

1. RECORDING ACT—*of the rule of priority.* A mortgage on land was not recorded until after a conveyance by the mortgagor was made to a person having notice of the mortgage, which deed was recorded, and not until after a conveyance was made by such grantee to another who had no notice of the existence of the mortgage, the mortgage being recorded a few days after the making of the second conveyance. On bill to foreclose the mortgage, such last grantee failed to produce his deed, or show when it was recorded: *Held*, that as the evidence did not show such second conveyance was recorded prior to the recording of the mortgage, it could not take precedence over the mortgage.

2. Under our recording laws, the instrument first on record takes priority, without regard to the time of its execution. So, a subsequent deed will not take effect to cut off a prior mortgage, unless it is first put upon record.

APPEAL from the Circuit Court of White county; the Hon. THOMAS S. CASEY, Judge, presiding.

Mr. THOMAS G. PARKER, and Mr. S. F. CREWS, for the appellant.

Mr. P. A. PEARCE, for the appellee.

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Opinion of the Court.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court :

This was a bill to foreclose a mortgage, executed on the 22d day of September, 1874, by Isaiah McHenry, to the complainant in the bill, John W. Stum, to secure the payment of seven promissory notes, of \$100 each, due, respectively, on the 1st day of March, 1876, 1877, 1878, 1879, 1880, 1881, and 1882, which were given for the purchase money of the mortgaged premises, consisting of 80 acres of land in White county. The bill was brought to foreclose the mortgage for the non-payment of the note due March 1, 1879, the notes which became due before that time having been paid.

It is alleged in the bill that the mortgage was recorded on the 15th day of March, 1879; that on the 7th day of November, 1878, Isaiah McHenry conveyed the mortgaged premises to William R. Cochran and Samuel Strong; that the grantees were informed, at the time of the conveyance, of the existence of complainant's mortgage, and that they took the deed subject to the mortgage. It is also alleged in the bill, that on the 13th day of March, 1879, Cochran and Strong conveyed the premises to Isabelle Simmons; that the conveyance was made without consideration, and for the purpose of defrauding complainant.

Cochran and Strong, and Isabelle Simmons, and the mortgagor, Isaiah McHenry, were made parties defendant to the bill. The defendants, Cochran, Strong and Simmons, put in an answer to the bill. A replication was filed, and a hearing had on the evidence, which resulted in a decree in favor of complainant, as prayed for in the bill, and the defendant Isabelle Simmons appealed.

There is no controversy in regard to the fact that Cochran and Strong had notice of the existence of complainant's mortgage at the time they obtained a deed to the mortgaged premises. The evidence upon this point is clear and undisputed. But it is claimed that Isabelle Simmons purchased the premises in good faith, without notice, and that she is

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entitled to hold the premises as an innocent purchaser. The circumstances under which Isabelle Simmons obtained a deed for the land are calculated to create a strong suspicion that she knew, or had good reason to know, of the existence of complainant's mortgage, although there is no direct proof in the record that she had notice of the mortgage, or notice of such facts as might put a prudent person on inquiry.

But we do not find it necessary to determine whether appellant, at the time of the alleged purchase of the premises, knew of the existence of the mortgage or not, as the decree will have to be affirmed on another ground. It is alleged in the bill, and shown by the evidence, that the deed to Isabelle Simmons was executed on the 13th day of March, 1879. There is also proof in the record that the deed was recorded, but the deed was not introduced in evidence, and the record contains no evidence, in regard to the date, that the instrument was recorded. Conceding, then, that appellant purchased the mortgaged premises without notice of the existence of complainant's mortgage, if she failed to record her deed until after March 15, 1879, the date of the record of the mortgage, the deed would stand subordinate to the prior lien of the mortgage. Under our recording laws, the instrument first on record takes priority. *Brookfield v. Goodrich*, 32 Ill. 363.

The statute declares: "All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect, and be in force, from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record." Rev. Stat. 1874, p. 278. The deed made to appellant could not take effect so as to cut off the mortgage unless it was first on record, and this fact appellant was bound to establish by the evidence. It may

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be, that under the allegations of the bill appellant could not be required to prove the date of her purchase as that was alleged, but the bill contained no allegation in regard to the date of the record of the deed, and that was a vital fact, which appellant was bound to establish.

As the evidence fails to show that the deed was recorded prior to the mortgage, the decree giving the mortgage a prior lien must be affirmed.

Decree affirmed.

JOHN W. THRIFTS

v.

ANDREW J. FRITZ.

Filed at Mt. Vernon January 18, 1882.

1. *APPEAL—what matters embraced therein.* On appeal by an alleged purchaser of mortgaged premises at a master's sale, who was also a party complainant to the bill to foreclose, he holding the senior mortgage, from a decree requiring him to pay the difference between the amount bid by him and the amount realized on a resale, the original record in the proceedings to foreclose can not be considered by this court as evidence of any facts, unless offered in evidence in the proceeding against the purchaser, and preserved in the record of that case by bill of exceptions or certificate of the judge. In such case the motion or petition to enforce the liability of the purchaser is a separate and independent proceeding.

2. *JUDICIAL SALE—proceeding against purchaser for not completing his bid.* A proceeding against a purchaser of land at a master's sale to subject him to the payment of the difference between his alleged bid and what the premises sold for at a resale on his neglect to pay the amount of his bid, is essentially a new proceeding from the one in which the sale was ordered, and whether it is against a party to the original suit or a stranger making the alleged bid, he must have notice, unless he voluntarily submits to the jurisdiction of the court, by answer or otherwise. It is a summary proceeding, and it seems it may be either by petition or motion.

3. *SAME—steps necessary to charge purchaser for a loss in consequence of not completing purchase.* It is essential, in order to charge a purchaser at a judicial sale with the difference between his alleged bid and the amount

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Brief for the Appellant.

realized on a second sale, that the master should report the sale to him, and that he refuse to comply with his bid; and if, upon notice, he shows no cause against it, he should be ordered to complete his purchase within a certain time fixed by the court, and in default thereof the property should be resold at his risk and expense.

4. EVIDENCE—*master's report*. In a proceeding to charge a purchaser of land sold under a decree of foreclosure with the difference between his bid and the sum bid on a resale, the master's report will be *prima facie* evidence, under the statute, of what it is by law required to contain. But such reports must be introduced in evidence, and preserved in the record in the usual mode, to authorize a monetary decree against the alleged purchaser.

5. CHANCERY PRACTICE—*former adjudication—how presented as to defence set up in answer*. If the matters set up in an answer as a defence have been previously adjudicated, it should be set up by plea or replication, upon which issue can be taken, so as to give the defendant an opportunity to present any evidence he may have on the subject. It can not be taken by exception to the answer.

6. AMENDMENT—*of process after judgment or decree*. No amendment is allowable to the service of process at a subsequent term of court to the one at which the decree or judgment was rendered, as a matter of course, without notice to the parties alleged to have been regularly served, or whose rights will be directly affected thereby. And this rule applies, though they are not parties to the suit being tried when the amendment is sought to be made.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Pope county; the Hon. DANIEL M. BROWNING, Judge, presiding.

Messrs. GREEN & GILBERT, and Mr. J. C. COURTNEY, for the appellant:

The amendment of the appointment in writing of the special deputy, without notice to the defendants in the foreclosure suit, after the term at which the final decree was entered, was error. *Planing Mill Co. v. National Bank*, 86 Ill. 590; *O'Connor v. Wilson*, 57 id. 226; *Cook v. Wood*, 24 id. 295; *Walahan v. People*, 40 id. 103; *Bryant v. Vix*, 83 id. 11; *Lill v. Stockley*, 72 id. 495; *Chicago Mill Co. v. National Bank*, 96 id. 587; *Chicago Planing Mill Co. v. Merchants' National Bank*, 97 id. 244.

Brief for the Appellee.

A deputy sheriff, or other deputy, has no power to appoint a deputy. Bouvier's Law Dic. vol. 1, p. 409; Jacob's Law Dic. under title "D," ed. of 1739; Viner's Abridg. title "Deputy;" Bacon's Abridg. title "Sheriff," p. 155; Rev. Stat. 1874, chap. 125, sec. 10; *Illinois Land and Loan Co. v. McCormack*, 61 Ill. 332.

A purchaser at a judicial sale will not be compelled to complete the sale if the title be defective. Rorer on Judicial Sales, p. 66, sec. 155; second ed. p. 70, sec. 150; Freeman on Executions, 503, sec. 302; *Williamson v. Field*, 2 Sandf. Ch. 533; *McGowan v. Wilkins*, 1 Paige, 120; *Jackson v. Edwards*, 22 Wend. 498; *Morris v. Mowalt*, 2 Paige, 580; *Matter of Cavanaugh*, 37 Barb. 22; *Conner v. Smith*, 10 Watts, 392; *Boggs v. Hargrove*, 16 Cal. 559.

It is only a final decree that is *res judicata*, and it must be specially pleaded, and proven. The only issue appellant was allowed to make was upon his averment that the special deputy, Weaver, was not appointed by the sheriff. He had no opportunity of giving evidence as to the other matters of defence, and there was no finding on this particular issue.

The sale to McCoy was a master's sale, made under a decree of court, and the law is well settled that such sales are never complete until the master makes a report of the sale, and the sale is confirmed by the court. Until then the transaction is a mere contract of sale, binding upon no one, and depending upon the approval of the court for its validity. *Garrett v. Moss et al.* 20 Ill. 594; *Dill v. Jasper*, 33 id. 262; Rorer on Judicial Sales, pp. 1, 2.

Mr. W. P. SLOAN, and Mr. R. A. D. WILBANKS, for the appellee, referred to the opinion of Mr. Justice BAKER, in *Thriffts v. Fritz*, 7 Bradw. 55, as presenting fully and logically the facts of the case.

A deputy is by statute authorized to perform any and all the duties of the sheriff, and his act is made that of the sheriff. Rev. Stat. 1874, chap. 125, sec. 12.

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It frequently happens that the sheriff is sick or absent, leaving a deputy, and it becomes important in some urgent case to have a special deputy appointed. Admitting that the amendment was made without notice to the defendants in the foreclosure suit, the question arises, was notice essential to the validity of the appointment? If not, we insist no notice was necessary, and the jurisdiction of the court, as to the persons of defendants, was complete.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Much confusion exists in this record on account of the introduction of irrelevant matter in no way connected with the present appeal. It is to be regretted the abstracts are not so prepared as readily to present a clear understanding of the case. It will simplify the investigation to ascertain what the litigation in this court concerns.

On looking into the transcript filed in the cause, it is seen an appeal was taken by John W. Thrifts from a judgment rendered against him in the circuit court of Pope county, on the 22d day of October, 1879, in favor of Andrew J. Fritz, for the sum of \$151.20 and costs of suit, and in case of default in payment of the sum adjudged against him, within a time fixed by the order of the court, it was ordered that execution issue therefor. That judgment was affirmed by the Appellate Court for the Fourth District, and now defendant brings the case to this court, a majority of the judges of the Appellate Court having certified they were of opinion the case involves questions of law of such importance, on account of the legal principles involved, that it should be passed upon by the Supreme Court,—which, under the statute, authorizes him to bring his appeal to this court.

That which is called a "bill of exceptions," made part of the record, by the judge of the circuit court in which the cause was tried, contains all the evidence that can be considered on this appeal. It contains the petition of Andrew J. Fritz,

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in which it is recited a petition was filed in the case of *Andrew J. Fritz v. Cassandra Jenkins et al.*, in which it was set forth that said cause was pending on a bill to foreclose a mortgage, in the circuit court of Pope county, at the March term, 1878, when John W. Thrifts, a junior mortgagee, was, on his own petition, made a party; that a decree was rendered in favor of petitioner, Andrew J. Fritz, for the sum of \$138.08, and also in favor of defendant, John W. Thrifts, the junior mortgagee, for the sum of \$65, and the mortgaged premises ordered to be sold, the proceeds to be applied to the payment of the costs of the proceedings, and to the payment of the claims of the respective mortgagees. It is further set forth in the petition, that the master in chancery, after giving the notice required by the decree, offered the mortgaged property for sale; that the same was struck off to defendant for \$253.60, as to the highest bidder, and, although a certificate of purchase, in the usual form, was tendered to him, he refused to accept it and pay the amount of his bid. It is further represented, in and by the same petition, that at the March term, 1879, of the court, an order was entered requiring defendant, Thrifts, to pay the purchase money alleged to have been bid by him for the mortgaged property, within thirty days, and that in default thereof such real estate be resold by the master in chancery, at the risk and expense of defendant; and that, as defendant had not paid such purchase money, the master in chancery, after advertising the property, resold the same to Alonzo McCoy for \$5, that being the highest bid made, and issued to him the usual certificate of purchase. Upon the facts alleged, petitioner asked that defendant, Thrifts, be required, by an order of court, to pay the difference between his alleged bid of \$253.60 and the subsequent bid of \$5, viz.: \$248.60, together with the costs consequent upon this proceeding, as well as the costs of the proceeding against defendant at the March term, 1879, within a reasonable time, and in default

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thereof, that execution issue to the sheriff of Massac county to collect the same. To the petition and motion filed against him, defendant answered, that while the petition contained many facts that were true, and some that were untrue, yet upon the material matters which would fix liability on defendant the facts alleged are very inaccurate and greatly misrepresented, and then proceeds to relate what he alleges is a full history of his connection with the case. The substance of all that is material to the present consideration is: 1st. Defendant did not make any bid for the mortgaged premises at the master's sale. 2d. The premises were not bought by him. 3d. No certificate of purchase was ever tendered to him. 4th. He did not authorize any one to make a bid for him at the master's sale of the premises, and was greatly surprised when he heard the premises had been struck off at such sale in his name. 5th. That Thomas H. Clark, who made the alleged bid for defendant at the master's sale, was the acting solicitor for petitioner in the foreclosure suit. And 6th. The only notice defendant received of the resale of the property, was a notice from the master, on the 28th day of June, 1879, when in fact the resale did not take place until the 19th day of July, 1879. Exceptions to the answer of defendant, filed by petitioner, are: 1st. The matters set up are not responsive to the motion. 2d. The material allegations of defendant's answer were at issue, and adjudicated by the court, at its last term. And 3d. The answer is otherwise informal and insufficient. It appears the court "sustain the exceptions" to the answer of defendant, and thereupon leave was given to defendant to file another answer, which he did, the substance of which is, the only service of process in the foreclosure suit on defendants, a part of whom are minors, was by a person not authorized by the sheriff of the county to make service of such process; that the party making the service was appointed a special deputy for the sheriff of the county by an acting deputy, and not by the

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sheriff himself, and it is insisted the court never acquired jurisdiction of the persons of the defendants in the foreclosure suit, there having been no appearance by any adult defendant, and for that reason the decree of foreclosure, and the sale thereunder, were null and void. With his amended answer defendant filed the affidavit of the sheriff, in which he states the written appointment of a special deputy, on the back of the summons in the foreclosure suit, purporting to have been made by him, was not made by him, and was not signed by him. Exceptions filed by petitioner to the additional or amended answer of defendant, were by the court overruled, and thereupon he filed a general replication to the answer of defendant, such as is usual to an answer to a bill in chancery, stating that the matters therein set up are not true, and the allegations of the petition and motion are true, and for aught that appears in such answer the prayer of the petition and motion should be granted. Just before the hearing of the cause was commenced in the circuit court, and after a motion for continuance by defendant had been overruled, petitioner asked leave of the court to amend the appointment of the special deputy indorsed on the back of the summons, in the suit to foreclose the mortgage of petitioner, by adding below the name of the sheriff, which appears to be signed thereto, the words, "by Thomas H. Alexander, deputy," which motion, against the objection of defendant, was allowed, and the appointment of the special deputy was so amended. And thereupon the cause came on to be tried, when Thomas H. Alexander was introduced as a witness, and stated he was a deputy sheriff on the 20th day of October, 1877, when the summons in the foreclosure suit was given to him, and he appointed the deputy named, to serve the summons, and signed the sheriff's name to the appointment, and that the sheriff had told him if he became pressed with business to appoint a special deputy in any case, but gave him no particular authority in this case. The

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judge who heard the cause on the circuit, certified "the foregoing was all the evidence introduced on the trial of this cause." Upon that evidence the court found the principal allegations of the petition were true, and rendered a judgment or decree against defendant, in the sum of \$151.20, to be paid within sixty days, and in default of payment execution to issue therefor to the sheriff of Massac county.

It is obvious, the appeal in this case only brings up the record of the judgment or decree rendered against him, as has been seen, on the 22d day of October, 1879. The transcript of the original suit to foreclose petitioner's mortgage, and of all previous proceedings filed in this cause, constitute no part of the record of the case from which the appeal was taken, and can not be considered. Of what was previously decreed by the court, whether in favor of or against defendant, he does not now complain, and has assigned no errors calling in question any of such proceedings. The transcript of such proceedings finds no appropriate place with the record in this cause. *Smith v. Brittenham*, 88 Ill. 291; *Smith v. Brittenham*, 94 id. 624.

It is sought to subject defendant to the payment of the difference between his alleged bid for premises being sold under a decree of foreclosure in *Fritz v. Jenkins et al.*, and what the mortgaged premises sold for at a second sale made by the master in chancery. This is, essentially, a new proceeding, and whether it is against a party to the original suit, or a stranger, making the alleged bid, he must have notice, unless he voluntarily submits to the jurisdiction of the court, by answer or otherwise. It is a summary proceeding, and it is said it may be either by petition or motion. By petition is the mode adopted in this case. It is essential, to charge the alleged purchaser with the difference between his alleged bid and the amount realized on a second sale, the master should report the sale to him, and his refusal to comply with his bid, and if upon notice he shows no cause against

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it, he should be ordered to complete his purchase by a certain time fixed by the court, and in default thereof the property will be resold at his risk and expense. *Hill v. Hill*, 58 Ill. 239.

It may be the petition sets forth with sufficient certainty every material fact necessary to entitle him to a decree against defendant for the difference between the first bid and the amount of the second bid, and it seems the circuit court found, by its decree, the allegations of the petition in that regard were true, as stated; but the difficulty in the case is, the evidence preserved in the record does not warrant the findings of the court. The record contains a "bill of exceptions," which it is certified contains all the evidence introduced on the trial of the cause. It will be observed it contains no evidence defendant, or any one for him, ever bid off the mortgaged premises at any sum, and refused to complete his purchase. Had the master's report been introduced in evidence, under the statute it would have been evidence of what it is required by law to contain. But that was not done, nor is there any evidence of resale, upon notice to the party to be charged with the deficit, to be found in the record. Here, again, the master's report, had it been introduced, would have been evidence, *prima facie* at least, of these essential facts. It may be true, and doubtless is, the transcript filed with this record contains what purports to be reports of the master in chancery as to his acts and doings under the decree of the court in the foreclosure suit, but this court can not search them out, and if found can not take judicial notice they are official papers. They should have been introduced in evidence, and made a part of the record in the usual mode known to the practice, by bill of exceptions or certificate of evidence, before they can be used as evidence against defendant. Notwithstanding this is a summary proceeding against defendant, a case must be proved before a monetary decree can rightfully be pronounced against him, as in other cases in law or equity.

Opinion of the Court.

This view sufficiently disposes of the case so far as the present judgment is concerned ; but a few questions that will necessarily arise on another hearing, and which are directly presented by the rulings of the circuit court, remain to be considered. One exception taken to defendant's answer is, the material matters contained therein were at issue, and were adjudicated by the court at a former term. The objection taken should have been presented by plea or replication, upon which issue could have been taken. Whether the matters alleged in defendant's answer as a defence to the petition were at issue, and had been adjudicated by the court at a former term, is a matter of evidence concerning which defendant had a right to be heard. It was not proper practice to sustain an exception to the answer, for the reason stated.

The point made, the court erroneously permitted an amendment of the service of summons in the suit of petitioner to foreclose his mortgage, without notice to the defendants in that suit, needs only a few words of illustration. The practice in such cases has become settled by the previous decisions of this court. No amendment is allowable to the service of process at a subsequent term of court to the one when the decree or judgment was pronounced, as a matter of course, without notice to the parties alleged to have been regularly served, or whose rights would be directly affected. *O'Connor v. Wilson*, 57 Ill. 226 ; *Planing Mill Co. v. National Bank*, 86 id. 587. The rights of defendants in the original suit, out of which this litigation arises, would be directly affected, and it was plainly error in the court to permit any amendment of the return of service of process as to them, without notice in reasonable time to enable them to make a suitable defence, if any they had. Whether the service of process on them was sufficient in the first instance to give the court jurisdiction in the foreclosure suit, is a question the determination of which does not come within the present discussion, and as to which no opinion will be expressed.

Syllabus.

The judgment of the Appellate Court will be reversed, and the cause remanded to that court with directions to reverse the decree or judgment of the circuit court, and remand the cause for further proceedings.

Judgment reversed.

Mr. JUSTICE MULKEY took no part in the consideration of this case.

WILLIAM RHODE *et al.*

v.

MATTIE McLEAN.

Filed at Mt. Vernon January 18, 1882.

101	467
124	205
101	467
88a	670
101	467
f189	590
101	467
108a	1841

1. SECONDARY EVIDENCE—as to contents of lost instrument—of the diligence required. While it may be true that every one into whose hands a writing has been traced should be produced before admitting secondary evidence of its contents, yet where the evidence shows the instrument to have been destroyed, no further proof is required in order to admit such evidence.

2. SAME—sufficiency of proof of a copy. On the question of the admissibility of a copy of an appeal bond in evidence, in a case where the principal had obtained and destroyed the original, the clerk of the court testified that he looked at the bond when handed him, and saw it was in the sum required by the order of the court, and that it was signed by the defendants, before he approved the same; that he could not swear whether the copy shown him was a copy or not; that he did not read the original bond through; that he only read far enough to see that it was an appeal bond in the case, and that the amount conformed to the order of the court, and who the sureties were, and that they were good; that his recollection was that the bond handed him by the defendant was on a printed blank; that the copy shown him was on a blank such as he generally used in the office; and that the defendant got a blank from him to fill up, in the case in which the appeal was taken: *Held*, that the proof was sufficient that the copy exhibited was in substance a copy of the appeal bond.

3. EVIDENCE—admission of principal evidence against his surety. The admission of the principal in an appeal bond that the bond was destroyed, he having taken it from the clerk's office and never having returned it, is

Brief for the Plaintiffs in Error.

evidence of the fact of its destruction, not only as against himself, but against his co-obligors as well.

4. SURETY—*signing on condition unknown to obligee.* The fact that a party signing an appeal bond as a surety, signed the same and left the bond in the hands of the principal upon condition others were also to execute the same before it should be delivered, and that it was used contrary to such condition, is no defence to the surety in a suit upon the bond, where the obligee is not chargeable with notice of the condition on which it was executed.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Richland county; the Hon. WILLIAM C. JONES, Judge, presiding.

Messrs. BELL & GREEN, and Mr. J. P. ROBINSON, for the plaintiffs in error:

The bond was shown to have gone into the hands of Henry Blatter, and he should have been called to account for it, before the admission of secondary evidence. 1 Greenleaf on Evidence, sec. 558; *Parkins v. Cobbett*, 11 Eng. C. L. 394; *Chapin v. Taft*, 18 Pick. 379.

And what Blatter said to Morehouse about the bond being destroyed, was no evidence against the other defendants. Blatter was a competent witness for the plaintiff, and could have been compelled to produce the bond on the trial. Rev. Stat. chap. 51, secs. 6, 9.

Where a written instrument is traced to the hands of a particular person, that person must be called and sworn to give an account of it. *The King v. The Inhabitants*, etc. 6 T. R. 236; *Jackson v. Hasbrouck*, 12 Johns. 192; *Woods v. Garrett*, 11 N. H. 442; *Poignand v. Smith*, 8 Pick. 278; *The Governor v. Barkley*, 4 Hawks, 20. See, also, as to the diligence required, *Mariner v. Saunders*, 5 Gilm. 113; *Rankin v. Crow*, 19 Ill. 626; *Cook v. Hunt*, 24 id. 535; *Williams v. Case*, 79 id. 356; *Wing v. Sherrer*, 77 id. 200; *Railway Company v. Ingersoll*, 65 id. 399.

Brief for the Defendant in Error.

The substance of a lost paper ought to be proven satisfactorily, and its contents should have been known to the witness, and understood by him, so as not to leave any doubt as to its material parts; and when the proof is made out by parol, the witness should have seen and read the paper, and be able to speak pointedly and clearly as to the tenor and contents. *Rigg v. Taylor*, 1 Pet. 591; *United States v. Britton*, 3 Mason, 464; *Rankin v. Crow*, 19 Ill. 626.

The law is well settled, that where a surety signs a note or obligation of any kind, on the express condition that it is to be signed by another person, as a co-surety, before it is delivered, and it is delivered without being so signed, the payee, or obligee, being chargeable with notice of such condition, such facts constitute a good defence to any action brought upon such instrument against the surety. *Stricklin v. Cunningham*, 58 Ill. 293; *Allen v. Marney*, 65 Ind. 398.

Mr. J. M. LONGENECKER, and Messrs. WILSON & HUTCHINSON, for the defendant in error:

As to the last point made, that the plaintiffs in error never consented to the delivery of the bond until it was signed by other obligors, the law is settled against the plaintiffs in error. *Smith v. Peoria Co.* 59 Ill. 412; *Comstock et al. v. Gage*, 91 id. 335.

The objection that the statement of Blatter that the bond was destroyed does not bind his co-defendants, is not sustained by authority. 1 Greenleaf on Evidence, pp. 252, 253; Wharton on Evidence, secs. 1091-2, sec. 143.

"If a document is conceded by the party in whose hands it was last heard from, to have been lost or destroyed, then notice to him to produce it is unnecessary. He is estopped from setting up such possession of the paper as would make a notice to produce of use." Wharton on Evidence, sec. 161.

The loss is proved by the clerk's certificate or oath, where the statute requires it to be filed. Abbott on Trial Evidence, sec. 14, p. 510.

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Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action upon an appeal bond, given upon an appeal from a judgment of the circuit court of Richland county to the Appellate Court, brought against the sureties, wherein the plaintiff recovered, and the defendants bring the case here upon writ of error.

The questions made upon the record are the three following: First, that there was no sufficient foundation laid for the reception of secondary evidence, which was admitted, of the contents of the bond sued on; second, that the copy of the bond read in evidence was not shown to be a true copy of the original bond; and third, that the court below wrongly excluded the evidence offered by the defendants, that they signed the bond on condition that it was not to be used unless signed by other parties, who did not sign it, and that it was used contrary to such condition.

The appeal to the Appellate Court, upon which the appeal bond was given, was taken by Henry Blatter, who was the principal obligor in the bond. Mr. Knoph, the then clerk of the circuit court of Richland county, testified, that within the time limited for giving the appeal bond Blatter handed to him, in his office, an appeal bond, signed by Blatter and the defendants, and he approved the bond and filed it; that the next morning Blatter came into the office and asked witness for the bond, saying he would return it in a little while; that witness gave him the bond, and he took it away, and witness had not seen it since.

Mr. Morehouse, the deputy clerk, testified, that at the request of Mr. Knoph he went to Blatter and asked him for the appeal bond; that Blatter did not give it to him, but promised to return it in a few days; that he never did return it to the clerk's office, where he got it; that witness afterwards, at the request of Mr. Tippit, the succeeding circuit clerk, went to Blatter and demanded the bond, and the latter said he did not have the bond, and that it was destroyed.

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Mr. Tippit, the present circuit clerk, testified that in addition to sending his deputy clerk, Mr. Morehouse, for the bond, he himself demanded the bond of Blatter, and the latter said he did not know anything about it. There was proof that after diligent search in the clerk's office the bond could not be found there.

The objection is taken, that as the bond was traced to the hands of Blatter, he should have been produced as a witness to account for it, referring to *Mariner v. Saunders*, 5 Gilm. 113, *Rankin v. Crow*, 19 Ill. 626, *Cook v. Hunt*, 24 id. 535, among other authorities, as so holding. Such may be the general rule where the destruction of the instrument has not been shown, but where the evidence shows the instrument to have been destroyed, no further proof is required in order to admit secondary evidence of its contents. Blatter's (the principal obligor's) admission that the bond was destroyed, was, we think, evidence of the fact, not only as against himself but against his co-obligors as well. Mr. Greenleaf lays down the rule: "In the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one, is, in general, evidence against all. They stand to each other, in this respect, in a relation similar to that of existing co-partners. * * * And where two were bound in a single bill, the admission of one was held good against both defendants." 1 Greenleaf on Evidence, sec. 174.

As to the admission in evidence of the copy, the clerk testified, as the order of court itself in evidence showed, that the appeal was granted on Blatter's giving bond in the sum of \$3000, to be approved by the clerk of the court, and filed within thirty days; that he looked at the bond when handed to him by Blatter, saw it was in the sum of \$3000, and that it was signed by Blatter and the defendants; that he could not swear whether the copy in question shown him was a copy or not; that he did not read the bond handed him by

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Blatter, through; that he only read far enough to see that it was an appeal bond in that case, that the amount conformed to the order of the court, and who the sureties were, and that they were good; that his recollection was that the bond handed to him by Blatter was on a printed blank; that the copy shown him was on a blank such as he generally used in his office, and that Blatter got a blank bond from him to fill up in the case. The proof was sufficient that the copy exhibited in evidence was in substance a copy of the appeal bond, especially in view of the liberal presumption in favor of the proof which the law would indulge in such a case, in *odium spoliatoris*.

It is not pretended, and could not be claimed under the decisions of this court, that the facts offered to be shown by the rejected testimony would form any defence, unless the obligee in the bond was chargeable with notice of the condition upon which the sureties signed it. It is sought by the defendants to raise the question that the obligee is chargeable with such notice, from the fact that in the copy of the bond read in evidence by the plaintiff, as it appears by the bill of exceptions, the name of a party who did not sign the bond, to-wit, Ferdinand Schmadel, is inserted in the bond with the names of the parties who did sign it; that this was a suspicious circumstance appearing on the face of the bond, indicating that it should have been signed by other parties before being filed in the clerk's office, and that this should have put the obligee or clerk on inquiry, which would have led to a knowledge of the condition offered to be proved by the defendants; that whatever is sufficient to put a reasonable man on inquiry, amounts to notice, and referring to *Allen v. Marney*, 65 Ind. 398, as sustaining the proposition, and citing the authorities which do so.

We do not think the evidence shows that the bond did contain the name of Ferdinand Schmadel, and hence there is no basis of fact for raising the question of notice of the

Opinion of the Court.

condition which defendants would make. The so-called copy read in evidence, and which contains in the body the name of Ferdinand Schmadel, was the copy attached to the declaration as a copy of the bond sued on. The suit, as appears, was brought under the misapprehension that Schmadel was one of the signers to the bond, as it was brought and the declaration filed against him as a party, together with the present defendants, hence his name appearing in the copy of the bond attached to the declaration. In the progress of the cause, and before the time of trial, on motion of the plaintiff the suit was dismissed as to Ferdinand Schmadel, and leave was given by the court to plaintiff to amend the declaration, and the copy of the bond filed with the declaration, by striking out the name of Ferdinand Schmadel. As that name does not now appear as signed to the copy of the bond contained in the bill of exceptions, plaintiff, evidently, in pursuance of the leave of the court, amended the copy filed with the declaration by striking out the name of Schmadel as a signer to the bond, and omitted, through inadvertence, no doubt, to strike out that name also in the body of the copy. There was no evidence that the copy was a true copy of the bond, and, under all the circumstances, Schmadel's name appearing, as it now does, in the body of the copy of the bond shown in the bill of exceptions, is of no significance as showing that that name appeared in the body of the appeal bond itself.

Finding no error in the respects claimed, the judgment will be affirmed.

Judgment affirmed.

101 474
91a 48

HENRY PLUMMER

v.

ROBERT F. WHITE.

Filed at Mt. Vernon January 18, 1889.

1. FORMER ADJUDICATION—*as to homestead right.* Where in a suit in which the heirs and devisees of a deceased owner of land, occupied by him as a homestead, are parties, the premises are set off to the widow of the deceased as her homestead, this is an adjudication that up to that time she had not lost her homestead by abandonment.

2. HOMESTEAD—*not abandoned by a sale.* The alienation of the homestead by a widow after it has been set off to her, does not constitute an abandonment of it, but her grantee may hold the same against the heir.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. M. SCHEFFER, for the appellant.

Mr. HENRY C. GOODNOW, for the appellee, on the question of abandonment of the homestead, cited *Walters v. The People*, 21 Ill. 178; *Vanzant v. Vanzant*, 23 id. 536; *Cipperly v. Rhodes*, 53 id. 346; *Potts et al. v. Davenport et al.* 79 id. 455; *Stevens v. Hollingsworth*, 74 id. 202.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

This case was before this court at the May term, 1880, and an opinion was delivered in October, 1880. The leading facts of the case, as presented here now, do not differ essentially from those heretofore considered. For their statement we refer to the report of the case. *White v. Plummer*, 96 Ills. 394.

By the agreed statement, this land was set off to the widow, as her homestead, at the February term, 1879, and in August, 1879, she conveyed the same to White, the appellee. If, upon a hearing, at the February term, 1879, in a

Syllabus.

proceeding wherein the heirs and devisees of her husband were parties, this land was set apart as her homestead, that of itself was a necessary adjudication that up to that time she had not lost her homestead right by abandonment. The case now presented contains no evidence tending to prove an abandonment, on her part, of the premises, after the decree, and before her conveyance to White.

Adhering to the view heretofore expressed, that alienation does not constitute abandonment, we find no ground for reversing the present judgment, and the same is therefore affirmed.

Judgment affirmed.

THE CITY OF CAIRO

v.

FREDOLINE BROSS.

Filed at Mt. Vernon January 18, 1882.

1. MUNICIPAL CORPORATIONS—*power to require the taking out of license for certain occupations and kinds of business—construction of the general Incorporation act.* Where the legislature, by the general Incorporation act, declares that the corporate authorities of cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration, by a familiar rule of construction, must be construed precisely as if the law, in express terms, inhibited the licensing of all trades and occupations not contained in the enumeration.

2. SAME—*uniformity of organisation is the purpose of the general law.* The object of the general Incorporation law is to place all cities, towns and villages organized under it, and of the same grade, upon a uniform and common footing with respect to their corporate powers and the manner of exercising them.

3. SAME—*reorganization under general law—effect upon prior powers and ordinances under special charters.* It was not intended that a change of organization by a city, from its special charter to the general Incorporation law, should at all affect its corporate existence or liabilities, nor

101	475
128	476
101	475
35a	653
101	475
187	670
101	475
46a	445
101	475
172	219
101	475
176	140

101	475
e112a	98

Brief for the Plaintiff in Error.

that its existing powers or government should be changed or otherwise affected, except so far as the provisions of the general law differed from those of the old charters. So far as their provisions are substantially the same, or not inconsistent with each other, they, together with all ordinances based thereon, are to be continued in force.

4. But after such reorganization by a city or village, any laws in its special charter, or otherwise, in conflict with the general law, no longer apply to it under its new organization.

5. The provision in the general Incorporation law of cities and villages, that "all ordinances, resolutions and by-laws in force in any city or town where it shall organize under this act, shall continue in full force and effect until repealed or amended, notwithstanding such change of organization," was intended to continue in force only such ordinances, etc., adopted under a special charter, which might lawfully be passed under the general law.

6. SAME—as to power to require merchants to take out license. Under the general Incorporation law, a city organized under its provisions has no power to require merchants to take out a license, and an ordinance so requiring a license, adopted under its special charter before its reorganization under the general law, will cease to have any binding force.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Alexander county; the Hon. DAVID J. BAKER, Judge, presiding.

Messrs. GREEN & GILBERT, for the plaintiff in error:

The special charter of the city of Cairo, in force at the date of the reorganization under the general Incorporation law, gave the city express power to license, tax and regulate merchants. While it is true the general law grants no such express power, it is equally true that it is silent, and does not in any manner prohibit the exercise of such power. On the contrary, the general act (art. 5, sec. 1, item 4,) expressly gives the council power "to fix the amount, terms and manner of issuing and revoking licenses," generally.

The power to license merchants is not inconsistent with the powers granted by the general law, and the ordinance on that subject is therefore preserved, under sec. 6, art. 1, of that law. A general law does not operate to repeal a special

law on the same subject, although passed at the same session. 78 Ill. 549.

In the case of two affirmative statutes, one does not repeal the other, if both may consist together. 77 Ill. 271.

Messrs. LINEGAR & LANSDEN, for the defendant in error:

The general law repealed the power to tax and license merchants. *Law et al. v. People*, 87 Ill. 387; *People v. Cooper*, 83 id. 585; *Culver v. Third National Bank*, 64 id. 528; *Andrews v. People*, 75 id. 605; *Devine v. Comrs. of Cook Co.* 84 id. 590.

Counties and cities are alike subject to the control of the legislature; and has not the legislature, in effect, completely revised and recast the charter of the city of Cairo, by its passage of the general act allowing it to change its organization from the old to the new act?

Again, what was the object of the constitution in providing that no city should be organized, or have its charter changed or amended, except by a general law passed for that purpose? The Supreme Court has said that the object was to bring about a uniformity of organization on the part of cities. There is a like provision relative to counties. *Devine v. Commissioners, etc. supra*, and *Guild v. City of Chicago*, 82 Ill. 472.

In case of two statutes relating to the same subject, and not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern in the case, this will be construed as repealing the original act. *Sacramento v. Bird*, 15 Cal. 294; *State v. Conkling*, 19 id. 501; *Swan v. Buck*, 40 Miss. 268; *School District v. Whitehead*, 13 N. J. 290; *Plank Road v. Allen*, 15 Barb. 15.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This was an action originally instituted by plaintiff in error before a police magistrate, to recover from defendant in error a penalty of \$10, imposed by an alleged ordinance of the city

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of Cairo for carrying on the business of a merchant within the corporate limits of the city without having first procured a license for that purpose, as required by the provisions of the ordinance. There was a judgment for the defendant before the magistrate, and the city appealed to the circuit court, where a similar conclusion was reached. The city thereupon prosecuted an appeal to the Appellate Court for the Fourth District, where the judgment of the circuit court was affirmed, and the case now comes here on error from the Appellate Court.

It appears that the city of Cairo, in 1867, was organized under a special act of the legislature, by the provisions of which it was authorized to license a number of trades and occupations, including that of *merchants*. In the exercise of this power, the city council passed an ordinance requiring all merchants doing business within the corporate limits of the city to procure licenses for the carrying on of such business, and imposing a penalty of \$10 for every breach of such ordinance. In January, 1873, plaintiff in error, in pursuance of a vote of the qualified voters of the city, was reorganized under the general Incorporation law relating to cities and villages, and from thence until the present time has been acting under the same.

While the general Incorporation law authorizes the corporate authorities of the city to license certain trades and occupations, yet it does not, like the special charter of 1867, authorize the licensing of *merchants*, and in this respect we regard the two acts as in conflict. When the legislature, by the general Incorporation act, declares that the corporate authorities of cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration must, by a familiar canon of construction, be construed precisely as if the act in express terms inhibited the licensing of all trades and occupations not contained in

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the enumeration. In discussing this principle, the Supreme Court of the United States, in *Thomas v. West Jersey Railroad Co.* 101 U. S. 82, says: "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others."

Applying the principle to the several provisions of the general and special charters, with respect to the question under consideration, they are clearly inconsistent with each other; for the special charter, as we have already seen, in express terms confers the power to license merchants, while the general charter, by necessary implication, denies it. By section 6, art. 1, of the latter act, it is expressly provided that after such reorganization under the general law, all laws in conflict with its provisions shall no longer be applicable to the municipality under its new organization. The two acts being inconsistent in the respect mentioned, it follows that the provision in the special charter authorizing the licensing of merchants ceased to have any application to the city upon the change in its organization. The practical effect of this was to leave the ordinance under which the defendant in error was prosecuted, without any power or authority to support it.

It is urged, however, that notwithstanding the provision in the special charter authorizing the taxing of merchants ceased to be applicable to plaintiff in error upon the change in its organization, still, by an express provision in the general law, the ordinance itself is continued in force, and fully authorized a conviction. The provision relied on as sustaining this view is found in section 11, art. 1, of the general Incorporation act, and is as follows: "All ordinances, resolutions and by-laws in force in any city or town when it shall organize under this act, shall continue in full force and effect until repealed or amended, notwith-

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standing such change of organization." While this view, at first blush, may seem plausible, yet we are of opinion that a fair construction of the language used, when taken in connection with section 6 of same article, which we have just been considering, does not sustain it. Doubtless, all that was intended by this provision was to continue in force all ordinances, resolutions, etc., adopted under a special charter, which could lawfully be passed under the general Incorporation law. The construction contended for would lead in this case, as in many others that might be suggested, to the illogical and absurd result that the legislature would intentionally repeal or abrogate a law authorizing the passage of an ordinance, and by another provision in the same act continue in force the ordinance itself, and also to the further result that a city or village reorganized under the general Incorporation law might have ordinances in force which the corporate authorities might repeal, or not, at their own pleasure, and yet if once repealed would have no authority to reenact them. We can not believe the legislature ever intended, by the provision in question, to bring about such a state of things.

It is said by Mr. Dillon, in his work on Municipal Corporations, sec. 20 (1st ed.): "General incorporation acts, rather than special charters, would seem, clearly, to be the best method of creating and organizing municipal corporations: 1. It tends to prevent favoritism and abuse in procuring extraordinary grants of special powers. 2. It secures uniformity of rule and construction. 3. All being created and endowed alike, real wants are the sooner felt and provided for, and real grievances the sooner redressed." Now, since the construction contended for would evidently defeat some of the objects the legislature may reasonably be presumed to have had in view in adopting the general Incorporation law, as shown by this distinguished author, it affords the most satisfactory evidence that such construction is not the true

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one. If, as claimed, the legislature intended to continue in force, after reorganization under the general law, all ordinances passed under special charters, without regard to whether any power is contained in the general law to support them, then the reorganization under the general law, so far from tending to "uniformity of rule and construction," would lead to the very reverse,—indeed, it would lead to great confusion and the most embarrassing complications. Under such a state of things, in every case where the question in controversy depended upon whether a particular ordinance passed under the old charter was in force or not, before one would be safe in arriving at a conclusion upon the subject he would necessarily have to examine both charters, and all ordinances passed under them subsequent to the original ordinance. This would not only involve the loss of much time and labor, but the conclusion reached, from the very nature of the case, would sometimes, if not often, be attended with more or less doubt and uncertainty. The construction we have given the act will obviate most, if not all, the inconveniences and evils that would inevitably result from the contrary view. In short, we are of opinion that it was the object of the legislature, in adopting the general Incorporation law, to place all cities, towns and villages organized under it, and of the same grade, upon a uniform and common footing with respect to their corporate powers and the manner of exercising them.

It was known to the legislature, at the time of the adoption of this act, that all the cities, and many of the towns, in the State, were incorporated under special charters, widely differing, in many cases, in their provisions. While some of the powers conferred by these charters were common to all of them, yet many of them were not. Upon adopting a general law on the subject, the legislature, as might have been expected, incorporated into it most of the powers to be found in the then existing special charters; but many of them, as in the case at bar, were omitted. The legislature did not see

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proper to directly repeal all special charters, but incorporated a provision in the general law by which existing corporations might abandon their special charters, and reorganize under the general Incorporation act. It was not intended that this change should at all affect the corporate existence or liabilities of the municipalities availing themselves of its benefits, nor was it intended that their existing powers or governments should be changed or otherwise affected, except in so far as the provisions of the general law differed with those of the old charters. So far as their provisions were substantially the same, or in other words not inconsistent with each other, they, together with all ordinances based thereon, were, by virtue of the 6th and 11th sections of art. 1, above mentioned, continued in force, in the same manner as if no change in the organization had taken place.

But it is objected that this would have been the result, under the circumstances supposed, without any special provisions in the general act to that effect, and that such a construction simply renders the provisions of sections 6 and 11, above cited, superfluous. Without stopping to determine whether this is so or not, it is sufficient to say that even admitting that the same result would, on general principles, have been reached without these sections, it does not at all follow that the object of the legislature in adopting them was different from that we have stated; for the legislature often, by way of giving a construction to a statute, declares, by a specific provision, that certain effects or consequences shall result from it, which, under a proper construction, would clearly flow from the act without the aid of such specific provision. Special provisions of this character are inserted to obviate all doubt as to the real objects of the legislature in adopting the act.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

LAFAYETTE BOLDEN *et al.*

v.

JAMES D. SHERMAN.

Filed at Ottawa January 18, 1882.

101	483
130	452
101	483
147	323
101	483
188	*607

1. *LIMITATION—possession to defeat legal title.* Adverse possession sufficient to defeat the legal title must be hostile in its character, and continue uninterruptedly for twenty years.

2. *SAME—under the act of 1835.* To make seven years possession by actual residence a bar to the recovery of land, under the Limitation act of 1835, the party must show that during such possession he had a connected title, in law or equity, deducible of record from this State or the United States.

3. *SAME—under act of 1839—payment of taxes.* Where the record shows that both parties in an action of ejectment have paid the taxes on the land in suit for seven years prior to the suit, without showing which paid first, a defence is not made out under the Limitation law of 1839. The burden of proof is upon the defendant setting up the statute, to show that he paid such taxes before the plaintiff. The party paying first in any year is the one who has paid the taxes of that year.

APPEAL from the Superior Court of Cook county; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. CHARLES H. WOOD, for the appellants:

A constructive adverse possession will extend over the whole of the tract included in the color of title, though only part be actually occupied. *Hinchman v. Whetstone*, 25 Ill. 185; *Jackson v. Camp*, 1 Cow. 605; *Munro v. Merchant*, 28 N. Y. 9.

When owners of adjoining lands build a fence between them upon the assumed boundary line, and each holds and occupies up to it on his side, claiming it as the true line, their possession is adverse, and will ripen into a valid title. *Burrell v. Burrell*, 11 Mass. 297; *Stuyvesant v. Tompkins*, 9 Johns. 62; *Jones v. Smith*, 64 N. Y. 180.

Again, I claim that the appellant Stevens has shown a connected title in law, deducible of record, to the premises in

Brief for the Appellee.

controversy, with actual possession for 19 years, and this is a sufficient bar to the plaintiff's action under the law of 1835, which is still in force. Rev. Stat. chap. 83, sec. 4; *Lender v. Kidder*, 23 Ill. 49; *Jandon v. McDowell*, 56 id. 53.

It is not necessary that he should reside upon every part and parcel of the land. *Williams v. Ballance*, 23 Ill. 193; *Wharton v. Banting*, 73 id. 16.

And such residence may be by a tenant. *Martin v. Judd*, 81 Ill. 480.

It is no objection that the title has come down through executors. *Collins v. Smith*, 18 Ill. 160.

Nor does it make any difference that there was a mistake in the boundary line of occupation. *Bauer v. Gottmanhausen*, 65 Ill. 499.

Again, I claim we established a good color of title, with possession and payment of taxes for more than seven years, on the whole of lot 11, and that is a bar to plaintiff.

Messrs. ROSENTHAL & PENCE, for the appellee:

Neither the twenty years' Statute of Limitations, nor the statute of 1835 or 1839, has been pleaded, hence no defence can be made under those statutes. *Borders v. Murphy*, 73 Ill. 81.

The nature of that adverse possession which is required to constitute a bar to the assertion of a legal title by the owner of it, or by one against whom the adverse occupant brings ejectment, must be actual, visible, notorious, distinct and hostile possession. Tyler on Ejectment, 900; 2 Smith's Leading Cases, *561; *Calhoun v. Cook*, 9 Pa. 226; *Turney v. Chamberlain*, 15 Ill. 271.

The Limitation law of 1835 does not apply, because the Stevens deed does not cover the six feet in question, and if it did, it does not show a connected title, deducible of record. As to the statute of 1839, the facts do not constitute a defence thereunder, because the deed to Stevens does not

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embrace this strip, and the evidence fails to show that Stevens paid all taxes legally assessed thereon for seven years.

Mr. JUSTICE SHELDON delivered the opinion of the Court :

This was an action of ejectment, brought by Sherman against Stevens and his tenant, Borden, for the recovery of six feet of land fronting west on State street, and lying between Thirteenth and Fourteenth streets, in the city of Chicago, being 170 feet deep. On trial before the court without a jury, there were a finding and judgment for the plaintiff, and the defendants appealed.

Sherman and Stevens are coterminous proprietors, Sherman on the south and Stevens on the north, and the controversy respects the boundary line running east and west between their lands. The six feet in question lies in the north-west fractional quarter of section twenty-two, running from State street east to Lake Michigan, and from Twelfth street south to Sixteenth street, the fractional quarter section containing about 107 acres.

Augustus Garrett was the common source of title to the premises in controversy. He, through *mesne* conveyances from the patentee from the United States, became vested with the south 33 acres of the north 1176.12 feet of the fractional quarter section. The south boundary line of this 33 acres was definite, the same being 1176.12 feet south from the north line of the quarter section, and there was no uncertainty as to this north line. Garrett owning this 33 acres, commenced to sell and convey the same in separate tracts, and he commenced conveying and measuring from the south line northward. He first conveyed a tract of 49.1 feet fronting on State street, and running through to the lake, to Hogan, the south line of this strip being the south line of the Garrett tract of 33 acres, and being 1176.12 feet south from the north line of the quarter section. The deed was filed for

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record September 15, 1846. Garrett next conveyed to Merritt 90 feet north, and adjoining the Hogan tract, running through from State street to the lake, the deed being filed for record August 14, 1847. Garrett next conveyed to Sherman, the plaintiff, 110 feet, lying north, and adjoining the Merritt tract, running through from State street to the lake, the deed being filed for record November 2, 1847. These three tracts together are 249.1 feet front on State street, and it is the north six feet of this Sherman tract about which this controversy arises.

Garrett, still owning the remainder of the south half of this 33 acres,—the north half having been conveyed to one Seaman, September 23, 1844,—died in 1849, having devised this tract so remaining in him to his wife, Eliza Garrett, and the latter died in 1856, devising the same to Grant Goodrich and other trustees, who conveyed to defendant Stevens, by deed dated April 5, 1860, a certain portion of such tract. The deed was filed for record April 23, 1860. Stevens claims under this deed, and to be in possession of this six feet thereunder.

It must be admitted that plaintiff holds the paramount title to this six feet by his prior deed from Garrett, for there can be measured off with certainty 249.1 feet north on State street, from a point 1176.12 feet south from the north-west corner of the quarter section 22, so as to leave no room for mistake. Indeed, there does not appear to be any dispute that plaintiff owns the paramount title from the United States of this six feet now occupied by defendants. But defendants' defence is under the statutes of limitation: first, the twenty years' Statute of Limitation; second, the seven years' statute of 1835; and third, the seven years' statute of 1839. The suit was commenced October 26, 1880.

Adverse possession sufficient to defeat the legal title must be hostile in its character, and continue uninterruptedly for twenty years. *Turney v. Chamberlain*, 15 Ill. 271; *Ambrose*

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v. *Raley*, 58 id. 506. It is not claimed for defendants that either of them was in possession of this six feet for more than nineteen years. *Bauer v. Gottmanhausen*, 65 Ill. 500, is referred to as an authority in favor of the defendants, where it was recognized to be the doctrine that when parties agree upon a boundary line between them, and enter into possession according to that line, they are thereby concluded from afterwards disputing that it is the true line, even when the Statute of Limitations has not run. But there is here nothing of any agreement in regard to a boundary line, or of any entering into possession according to any such line, to bring the present case within the rule of the case cited.

The statute of 1835, relied upon, is, that actions brought for the recovery of any lands of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record from this State or the United States, etc., shall be brought within seven years next after possession taken. Rev. Stat. 1874, p. 74. The record does not show title in Stevens to this six feet. The description in the deed to Stevens is as follows: "That part of fractional section 22, in township 39, north of range 14, east of the 3d P. M., commencing at a point on State street, 216 feet south of the north-west corner of the land belonging to the estate of the said Eliza Garrett, deceased, which adjoins the land formerly owned by Mrs. Ann Seaman, of New York; running thence south 51 feet, thence east 170 feet, thence north 51 feet, thence west 170 feet to point of commencing, known in a certain plat or subdivision of said property now in possession of the parties of the first part, as lots 10 and 11, in block number one."

As before observed, Garrett had conveyed to Seaman the north half of the 33 acres which he originally owned, which explains the reference to "Mrs. Ann Seaman" in the description in Stevens' deed. The interest of Mrs. Seaman came to Susannah Drake, and the boundary line between her and

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Garrett, on his north, was fixed by agreement in deeds of conveyance they made to each other in 1846. They attached to their respective deeds a map of the whole 1176.12 feet, dividing it off, and showing the tract by measurement intended to be conveyed to and owned by each. This map showed Garrett's land to be the south 516.58 feet, on State street, of the tract. Garrett having conveyed 249.1 feet thereof, as stated, to Hogan, Merritt and Sherman, he had left of the 516.58 feet, therefore, 267.48 feet. Of this latter piece the trustees of Eliza Garrett conveyed to Stevens 51 feet, commencing 216 feet south from the north-west corner thereof, and running south 51 feet. Adding 51 to 216 makes 267 feet, which lacks just .48, or nearly one-half of a foot, of reaching the north line of Sherman's land, and hence covers, by the description, no part of the six feet in controversy, which is the north six feet of the south 249.1 feet.

Stress is laid by appellant on the concluding part of the description, that the property is known in a certain plat or subdivision, now in possession of the parties of the first part, as lots 10 and 11, in block number one. If this be taken as referring to the plat of a subdivision made in 1856 of the remaining part of the land which was left in the Garrett estate, that plat shows nothing different from the preceding portion of the description, but shows just the same. The plat purports to be a map of the subdivision of the "Garrett tract," to be "Garrett subdivision of land N. W. frac. $\frac{1}{4}$ 22, 39, 14," and in no other respect locates the land platted. The plat shows eleven lots fronting on State street, numbering from north to south, the first nine of the width of 24 feet, and lots 10 and 11 of the width, respectively, of 24 and 27 feet, the sum of them all being 267 feet. So that, according to the plat referred to, equally as by the preceding portion of the description, the land conveyed to Stevens was the south 51 feet of the 267 feet which was remaining in the Garrett estate after the prior conveyances to Hogan, Merritt and

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Sherman, and which, as we have seen, did not include any part of the six feet in controversy. Going outside of the record, we think the proof shows that this Garrett subdivision, as actually surveyed and laid out, in fact did include this six feet in lot 11. But the record of itself does not show this, so that there does not appear by the record to be title in Stevens to the six feet, and he does not show a title thereto deducible of record from this State or the United States. To deprive a man of his land by statute, the exact statutory condition to warrant it must be shown to exist. We think there is failure here in the exhibition of a title of record. This renders it unnecessary to consider the other question under the statute, whether there was actual residence on this land, as both facts, of title of record and actual residence, must concur to constitute the defence.

The last defence claimed by defendants, is under the statute of 1839—color of title, and possession and payment of taxes for seven consecutive years. It is admitted of record that plaintiff has paid all the taxes upon these six feet, according to the description in his deed. There is nothing appearing in the evidence as to which party paid the taxes first. If in any single year plaintiff paid the taxes, and afterward Stevens paid the amount of the taxes on the same land, he would not have paid the taxes for that year—they would have been paid by plaintiff. Each party appearing as having paid the taxes, the burden was upon Stevens to show that he paid them before the same were paid by plaintiff. Failing in this, he does not make out a defence under this statute.

Finding the defence set up not to be sustained by the evidence, the judgment must be affirmed.

Judgment affirmed.

Mr. CHIEF JUSTICE CRAIG, and Mr. JUSTICE DICKEY, dissent.

Syllabus. Statement of the case.

SOLON HUMPHREYS *et al.*

v.

JOHN ALLEN, Receiver, *et al.**Filed at Ottawa January 18, 1888.*

RECEIVER'S CERTIFICATES—for indebtedness of railroad—made a first lien as against prior mortgage—time to question power of court. If the holder of railroad bonds secured by trust deeds on the road, having notice of the appointment of a receiver, and an order of court directing him on his petition to issue certificates of indebtedness on which to raise money to discharge a chattel mortgage on the personal property of the company, and to pay taxes, current expenses, etc., and making such certificates a prior and first lien on all the property of the company, desires to question the power of the court to make such order, he must do so before such certificates are issued and sold to *bona fide* purchasers, or paid out to creditors of the company. After their issue and sale, it will be too late for him, or purchasers from him with notice of the facts, to raise the question whether the subject matter to which the certificates were applied was within the scope of the power of the court in the preservation of the property for the benefit of all concerned.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the HON. DAVID McCULLOCH, Judge, presiding.

On May 21, 1864, the Peoria, Pekin and Jacksonville Railroad Company executed its 1200 coupon bonds, payable to Francis Cooley, or bearer, of which 800 were each for \$1000 principal, and 400 were each for \$500 principal, and they all bore interest, payable annually, at the rate of seven per cent per annum, after January 1, 1865, and the principal was payable July 1, 1894. These bonds were numbered consecutively, from 1 to 1200. To secure the payment of these bonds, this company, on the same day, executed a deed conveying to Francis Cooley and James Buell, as trustees, all the real and personal property of the company, then acquired or thereafter to be acquired. By a clause in the bonds, default in the payment of any part of any installment of

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interest for six months after demand therefor, was to render the whole of such bonds due and payable at once; and by a clause in the deed, after a lapse of six months after such default the trustees were authorized to take possession under the mortgage, upon the written request of any two or more of the holders of such bonds, and sell the property, etc. The company failed to pay a part of the interest due July 1, 1871, and also made default in payment of large sums of interest falling due thereafter. After the making of these bonds and this mortgage, the company made an issue of a series of second mortgage bonds.

At the February term of that court, for the year 1878, John Allen and John H. Allen, holders and owners of a large number of both first and second mortgage bonds, filed a bill in the circuit court of Peoria county, alleging demand of interest past due, default of payment thereof, and the insolvency of the company; alleging that the principal of all the bonds had become due, and asking foreclosure, and for the appointment of a receiver to take charge of the property and manage and operate the same. At that term John Allen was appointed such receiver, and entered immediately upon his duties as such.

Afterwards, at the May term, 1878, on the petition of Allen, as such receiver, an order of court was made and entered of record, reciting, in substance, that at the time of the appointment of such receiver the railroad company had become, and was, indebted for services, supplies, rentals (incurred within the preceding six months), and for unpaid taxes, \$67,831.51; and that the company was also indebted on March 4, 1878, to various persons, in the sum of \$81,600, which had been borrowed and expended in repairs and improvements of the road, and for the protection of the credit of the company, and being so indebted, executed to William W. Booraem, as trustee for such persons, a chattel mortgage upon certain of its engines and rolling stock, acquired by the

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company after the adoption of the constitution of 1870, and declaring the indebtedness for services, supplies, repairs and rentals a first lien upon the property of the railroad company; and declaring the chattel mortgage a valid lien upon the engines and rolling stock therein mentioned; and finding that it would be for the best interests of the railroad company, and for the preservation of its property and the saving of interest on the chattel mortgage, that the receiver should be authorized to raise money on certificates to be issued by him, and ordering, in substance, that the receiver be authorized to borrow money sufficient to pay all of such indebtedness, and to issue to the parties from whom he may borrow, receiver's certificates, bearing interest; and for the payment of such certificates he may use any part of the receipts or current revenue of the road which may be in his hands, in excess of current expenses; and further ordering, that the certificates issued to provide for the indebtedness for supplies, services, etc., shall be designated on their face as class "A," and that those issued to provide for the payment of the debt secured by the chattel mortgage shall be designated on their face as class "B." And it was further ordered, that all certificates so issued should be a valid and *first* lien upon all the property, real, personal and mixed, of such railroad company, and that the receiver report to the court the persons to whom such certificates may be issued, and on what account, the amount, time of payment, and rate of interest.

When this order was made, the railroad company and the trustees in the first and second mortgages were parties to the proceeding, and the trustees expressly consented to the order; but Mr. Constable was not a party, nor was Humphreys, Jessup, Terry or Field, nor bondholders other than the Allens, parties to the record at that time. The record, however, does show that Mr. Constable, who at that time was the holder, for himself or others, of the bonds now owned by Humphreys, Jessup, Terry and Field, was a director of the railroad com-

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pany, and was aware that the making of the chattel mortgage had been authorized by the board of directors, and of the fact that the same had been executed. The record also shows that he was present at a meeting of the board of directors on June 11, 1878, where it was reported to the board that the road had been placed in the custody of the receiver, and that an order had been made for the issue of receiver's certificates for the purposes named, and which it was ordered should be a first lien, as above stated.

During the summer of 1878, the receiver issued certificates of class "A" to the amount of \$67,483.65. Before the 1st of March, 1879, he issued also certificates of the class "B" to the amount of \$79,497.08; and the issuing of all of them was duly reported to the court. Of these certificates, Elizabeth Bayard held of class "A" to the amount of \$50,000 (numbers 7 to 16 inclusive), and of class "B" to the amount of \$25,000, (numbers 1 to 5 inclusive, and numbers 17 and 18); and William Oathout of class "A" held certificate number 6, amount \$5000, purchased in good faith for value, without notice of any defect or vice in them. The other certificates were given either for money borrowed or in satisfaction of debts which the receiver had been ordered by the court to pay, and those receiving such certificates surrendered the securities held by them for such debts. All this was known to Mr. Constable, who was a holder of a large amount of the bonds secured by the mortgages. He did not intervene in the litigation, or in any manner object to what he knew was being done.

On the 10th of May, 1879, James M. Constable sold to Solon Humphreys, Morris K. Jessup, John P. Terry and Cyrus W. Field, first mortgage bonds to the amount of \$692,000, with all outstanding coupons, and also second mortgage bonds of the company to the amount of \$664,000, with all outstanding coupons thereto attached; also, preferred stock of the company to the amount of \$164,400; also, common

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stock of the company to the amount of \$604,700. The price at which this purchase was made was \$380,600. Ten per cent of the same was paid in cash; ten per cent of the same was to be paid in November, 1879; twenty per cent in May, 1880; thirty per cent in May, 1881, and thirty per cent in May, 1882, with interest at the rate of six per cent per annum, payable semi-annually. By their agreement the bonds and stock were to be held by the Central Trust Company of New York, as collateral security for the payment of the purchase money, the buyers having the option to pay the same, with accrued interest, at any time within three years. It is recited in this agreement, that it was understood "that General Wager Swayne is to proceed, under the instructions of said Field, Jessup, Terry and Humphreys, to take such legal measures as may be requisite to foreclose the road, and also to change the receiver at any time, all costs and expenses of such proceedings to be borne by Jessup, Field, Terry and Humphreys, and also the expense of the trust."

On June 14, 1879, Francis B. Cooley and James Buell filed their cross-bill in the cause, setting up that they were trustees under the first mortgage, and charging that all the principal sums in the bonds had become due by default of payment of interest, and praying a foreclosure of the first mortgage.

On July 14, 1879, Humphreys, Jessup, Terry and Field having intervened and been made parties, were admitted in the chancery cause as co-complainants with the Allens, in which they set up their ownership of the bonds which they purchased from Constable, and charge that the receiver's certificates were improvidently authorized to be issued, and insisting that they ought not to be held a lien prior to their rights as holders of the mortgage bonds.

On the 7th of August, 1879, a decree of foreclosure was rendered, finding the whole amount of the principal of the first mortgage bonds to be due and payable, and that there

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was due and unpaid at that time, of interest specified in the coupons, \$417,278.87, and that there was also due at that date, \$89,764.19 of interest accrued upon overdue coupons; the whole amount found due was \$1,507,043.06. The decree ordered the road to be sold subject to taxes legally due, and to all just claims for right of way, and to certain prior mortgages on small portions of the real estate, and directed the master, after making the sale, to pay certain expenses, the compensation of the trustees, and thirdly, "all such indebtedness contracted, or to be contracted, by the receiver, as may not be excepted to, at or before the confirmation of said sale," and further directed that all the residue of the money arising from the sale shall be brought into court, subject to further order. The decree further provided, that the rights of all of the holders of the bonds and coupons, and of other persons having an interest in the fund, be reserved for subsequent determination; and that all such persons have the same rights against the fund arising from the sale that they would against the property sold prior. The master, under this decree, sold the railroad and property of the company, and Solon Humphreys became the purchaser for the sum of \$950,000. In the decree of foreclosure it is recited that the same was entered by the consent of the railroad company, John H. Allen, John Allen, Francis B. Cooley and James Buell, and of Humphreys, Jessup, Terry and Field.

Before the confirmation of this sale, Humphreys, Jessup, Terry and Field filed their exceptions to the payment of any and all indebtedness contracted by the receiver, except for necessary expenses in operating the road, and for supplies purchased since his appointment; and they especially objected to the payment of certain certificates under the order of the court, made May 6, 1878. After this, the sale was confirmed by order of the court.

The record shows that of the first mortgage coupons maturing on and after July 1, 1878, none were paid, and that of

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those maturing on and after July 1, 1871 (embracing the coupons attached to bonds 13 to 25 inclusive), a portion only have been paid, leaving \$227,278.87 unpaid. A rule was entered by the court on all the parties to show cause why distribution should not be made among holders of the bonds and coupons, and several claims of priority were interposed. Humphreys and his co-intervenors claimed that the coupons held by them should be paid in the order of their maturity, before any distribution could be legally made on the principal sums specified in the bonds. It was insisted by the holders of coupons on which nothing had been paid, where the holders of other coupons of the same series and time of maturity were paid in full, that they should be equalized, and that the amount due upon such unpaid coupons should be paid in full before any part of the fund should be distributed upon coupons maturing later, or upon the principal sums secured by the bonds.

The court ordered that all the certificates issued by the receiver, mentioned above, be first paid; and the court denied the application of coupon holders for priority of payment, and ordered that the fund, after the payment of costs and receiver's certificates, be distributed *pro rata* to the holders of bonds and overdue coupons, treating all such claims, whether for principal or unpaid interest, as equal in law and equity. From this decree Humphreys, Jessup, Terry and Field, and some other holders of bonds and coupons, appealed to the Appellate Court for the Second District, where the decree was affirmed. From the judgment of the Appellate Court, Humphreys, Jessup, Terry and Field alone appealed to this court, and insist: first, that coupons overdue at the time when the principal of the bonds became due are entitled to priority of payment over the principal sums mentioned in the bonds, and in the order of their maturity; and second, that holders of bonds and coupons are entitled

Brief for the Appellants.

to priority of payment out of the fund as against the holders of the receiver's certificates.

Mr. WAGER SWAYNE, and Messrs. HAY, GREENE & LITTLER, for the appellants, insisted it was error to allow the issue of receiver's certificates to pay claims for labor, supplies, etc., furnished the company within a period of six months before the appointment of a receiver, and also certificates with which to pay off an indebtedness for borrowed money, for which John Allen was personally responsible. The order of the court below established two classes of indebtedness as a first lien against the mortgaged property, amounting to about \$150,000. The claims thus allowed a preference over the debt secured by the mortgage, were contracted years after the execution and recording of the mortgage. This displacement is not warranted by authority, and is subversive of the inviolability of contracts.

On the final hearing in chancery all interlocutory decrees are open for revision, and are under the control of the court. *Fitzhugh v. McPherson*, 9 Gill & J. 51; *Ridgley v. Bond*, 18 Md. 433; *Fanniquet v. Perkins*, 16 How. 82; *Consequa v. Fanning*, 3 Johns. Ch. 364; *Gibson v. Rees*, 50 Ill. 383.

A trustee can not charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust. *New v. Nicoll*, 73 N. Y. 130.

The person appointed receiver was disqualified from acting, being the senior officer of the company, and its largest creditor. *Baker et al. v. Admr. of Backus*, 32 Ill. 115; *Taylor v. Oldham*, Jacobs, 527; *Kerr on Receivers*, 126-130.

The receiver's authority was limited by the order of the court under which he acted, and all persons purchasing his certificates were bound to take notice of the extent of his authority. *Bank of Montreal v. C. C. and W. R. R. Co.* 48 Iowa, 524; *Stanton et al. v. Ala. and Chattanooga R. R. Co.* 2 Woods C. C.

Brief for the Appellees.

As to the application of the earnings of a railroad to current expenses, etc., see *Fosdick v. Schall*, 9 Otto, 252.

Messrs. WILEY & NEAL, for the appellees:

The order was interlocutory only, and not subject to review in a higher court until a final decision. *Woodside et al. v. Woodside et al.* 21 Ill. 207; *Gage v. Eich*, 56 id. 297; *Racine and Miss. R. R. Co. v. Farmers' Loan and Trust Co.* 70 id. 249.

Even if the decree was erroneous, the rights of third persons acquired under it are not divested by its reversal. *McLagan v. Brown*, 11 Ill. 519; *Clark v. Pinney*, 6 Cow. 297; *Hubbell v. Brownwell*, 8 Ohio, 120; *Goudy v. Hall*, 36 Ill. 319; *Feaston v. Fleming*, 56 id. 457; *Gray v. Brignardello*, 1 Wall. 634; *Gusteau v. Wisely*, 37 Ill. 433; *Wadhams et al. v. Gay*, 73 id. 415.

As to the power of a court of equity to appoint a managing receiver of a railroad company when taken under its charge as a trust fund to pay incumbrances, and to authorize such receiver to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, see *Wallace v. Loomis*, 7 Otto, 147; *Meyer et al. v. Johnston*, 53 Ala. 237; *Stanton et al. v. Alabama and Chattanooga R. R. Co.* 2 Woods C. C.; *Fosdick v. Schall*, 9 Otto, 235.

The bondholders were represented by their trustees, and must be regarded as bound by their acts, so far as the interests of third persons acting upon the faith of the action of the court, may be affected. *Wallace v. Loomis*, 7 Otto, 163; *Jones on Railroad Securities*, sec. 539.

Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts, made in the ordinary course of business, shall be paid from the current receipts before he has any claim upon the income. *Fosdick v. Schall*, 9 Otto, 235.

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Mr. WHEELER H. PECKHAM, for the appellees the Bank of New York, National Banking Association, and Union National Bank:

The petitioners have consented to the entry of the order giving the certificates priority over the bonds. Even if the consent of the trustees of the mortgage was not binding on the bondholders, it was necessary that those who repudiate it should do so promptly. Silence after knowledge is consent. *Gold Mining Co. v. National Bank*, 96 U. S. 640. *Jones on Railroad Securities*, secs. 363, 438.

A court of equity having the power to issue receiver's certificates and make them a prior lien, a purchaser of them is not bound to look into the proofs and judge their sufficiency. Should the adjudication of the court be afterwards reversed, intermediate purchasers would be protected. *Lovett v. Reformed Church*, 12 Barb. 67; *Ebaugh v. Church*, 3 E. D. Smith, 60 N. Y. Com. Pleas; *Wood v. Jackson*, 18 Wend. 107.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

Whatever may be said as to the limitations which the law places upon the exercise of the power of the chancellor to make certificates issued by a receiver for moneys borrowed by him, a lien upon the property, superior to the vested lien of the mortgagees, in this case we think that appellants are not in a position to raise that question. The bonds which they held they bought from Mr. Constable on the 10th of May, 1879. At that time all of these certificates had been issued and disposed of by the receiver, and were held by the parties who had paid for them in cash, or had received them in substitution of securities which they held for preëxisting debts. Whether the subject matter to which these certificates were applied comes within the scope of the powers of the court in the preservation of the property for the benefit of all

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concerned, was a question which might have been raised, and ought properly to have been raised, before the certificates were issued and sold. Mr. Constable, the owner of these bonds, knew, as a director in the railroad company, and by proceedings which occurred in the directors' meetings, that the road and other property of the company had been placed in the hands of a receiver. He knew that the order for the issue of certificates, to be made a first lien upon the property of the company, had been entered of record, and that such certificates were about to be issued and put upon the market. The proceeds of a part of these certificates were to be applied in releasing from a chattel mortgage property upon which the bondholders claim to have a lien, and in which he had an interest as a stockholder. It was incumbent upon him, if he intended to insist that these certificates should not be a paramount lien upon the property of the company, that he should have intervened and raised his objections. On the contrary, with a full knowledge of all the facts, he lay by and permitted others in good faith to invest their money in these certificates, and the money to be applied for his benefit in discharging the liabilities of the company for services and supplies, and for a debt by which the rolling stock of the company in which he was interested was tied up. In a court of equity he could not be heard afterwards to claim that the holders of these certificates should not have this priority.

The appellants purchased these bonds on the 10th of May, 1879, and the circumstances show that they knew that the bonds had become over due, and that they were advised of the condition of the litigation. The very language of the contract by which they purchased shows that they knew that the road was then in the hands of a receiver, and that the conduct of the business by the receiver was not satisfactory, and accordingly they were authorized to take measures to have the receiver changed. Under the circumstances they occupy no better position as holders of these bonds than did Mr. Con-

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stable, whose mouth, we have seen, had been closed upon this subject by his own conduct.

The remaining question, relating to the priority claimed for holders of coupons first falling due, was disposed of, and by a majority of the court decided against the views of appellants, in the case of *Humphreys et al. v. Martin et al.* 100 Ill. 542, and need not be discussed here.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

Mr. JUSTICE WALKER, dissenting:

It is seldom that a question of more importance is decided by this court than the one arising on this record, and inasmuch as I am unable to concur in the conclusion announced, and owing to the importance of the question as a precedent, I feel compelled to present some of the reasons for my dissent. In submitting them, I shall not content myself with merely criticising the views presented by the court, as it is not the opinion, but the decision, to which I dissent. All know that a decision may be strictly and accurately correct, and yet the reasons assigned in its support be fallacious. If I were able to demonstrate that the reasoning of the court is wrong, the correctness or incorrectness of the decision would remain unapproached,—that inquiry would still remain. The record presents some questions that are of first impression in this court, which I think must be determined before a correct conclusion can be reached. I shall endeavor to demonstrate that the decision of the court below is grossly erroneous.

I shall consider the questions whether the circuit court erred in borrowing the \$149,431.51 on behalf of the railroad company or the fund, and had power to pledge the fund in court for its payment; whether it could make such indebtedness a superior lien to valid, unquestioned mortgage liens that appeared of record at and before the time the court borrowed that sum; and whether the court, before the final

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order of distribution, should not have placed all of the first mortgage bondholders on an equality in the payment of interest.

Preliminary to the discussion of these questions, I shall refer to some of the plain, and, I think, well recognized, rules governing courts of chancery in administering such funds. The power to do so is an extraordinary one, and until a recent period has been seldom resorted to in practice. It is arbitrary, expensive, and generally resulting in heavy loss, and, not unfrequently, in ruin to the fund, and is oppressive, if not ruinous, to the parties. It may be a serious question whether its exercise has been productive of more benefit than evil; still, it is a well recognized part of equity jurisdiction. It has been of comparatively rare use in the State tribunals, but of more general use in the Federal courts. A practice has obtained in those courts that may not, and perhaps should not, be adopted by the State tribunals, and certainly not if not based on equitable principles, or is not promotive of justice. A proceeding so expensive, if not oppressive, to the parties, and the exercise of the power being almost wholly discretionary, the court should never exercise it except in cases of necessity, and not then unless it is clearly necessary to preserve the fund from waste or misappropriation; nor should the power ever be exercised to enforce mere legal claims. To call the power of the court into action there should be property, or a fund, in which several have equitable claims, or liens adverse in character and conflicting in interest. In modern times the power has usually been exerted to settle squabbles between partners in business, or to settle and adjust conflicting liens on corporate property; and in its exercise, I have no doubt, the power has been the subject of much and frequent abuse. It has been perverted even to the foreclosure of a simple mortgage, by placing the mortgaged premises in the hands of a receiver, when the rents and profits would not pay such an officer his fair charges for holding and

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preserving the property, and this, too, when there was not the slightest reason for its exercise, because there was no danger of perversion or loss, and no conflicting equities. This is a manifest abuse of this dangerous power. Other abuses of the power seem to have obtained. It is perhaps more liable to be used as an engine of malice, or to procure fraudulent advantages, than any other power with which the chancellor is armed, and hence it should be more guardedly used.

Experience teaches, that when a partnership, by long and assiduous effort, has established a business and character more valuable than capital, it may be ruined and rendered totally worthless by a member of the firm who, from petty jealousy or affront, invokes this extraordinary power. In such cases the entire capital of the firm is taken out of the hands of its owners, tied up in the custody of the law, lies idle for years, and its owners deprived of its use, prevented from continuing in business, and perhaps utterly ruined, and at the end of the strife, the court, too late, learns it was all prompted by spite and malice. With corporations it is believed not to be unfrequent that a portion of the directors and stockholders form designs to acquire the corporate control and property to the exclusion of the others, and resort to this proceeding to consummate their purposes. These matters are referred to as illustrating the almost certain ruin to parties, and the great danger of the courts being used as the unconscious instruments to effectuate unjustifiable schemes, and as admonishing them of the great necessity of using this discretion sparingly and with great caution.

When the court has seized the property and placed it in the hands of a receiver, it becomes the duty of the court, through that officer and by orders of the court, to use every reasonable effort for its preservation, and if on the final hearing it appears to be required, to decree its sale and reduction to money, and its speedy distribution amongst those entitled

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to participate in the fund. One of its highest duties is the preservation of the property from all hazard and loss, and the fund from impairment and every kind of diminution. The court having deprived the owner of its care and custody, must use all reasonable efforts for its preservation; nor has the court the power to hazard either the fund, or its title, to loss. It must be held in the same condition, as to the rights of all parties, in its various changes, from its seizure till its distribution. The court has no right to change or modify the lien of any claimant, or in any manner jeopardize his legal or equitable rights, and all know the court can not do by indirection what it is powerless to do directly.

It is an egregious mistake to suppose that by seizing the property or fund the court or the receiver becomes its owner. The court is simply the legal custodian for its preservation and distribution, but invested with no title to, or interest in, the fund. The court, so to speak, is a mere naked bailee, charged with legal duties, but not invested with the slightest ownership of, or interest in, the property, beyond a mere right to, and the control of, its possession. All else are duties, and not rights. When the court seizes the property of a business firm or corporation, it does not become the firm or corporation, or invested with the powers or legal rights of either,—it simply becomes the legal custodian of the property. It does not necessarily have control over the partners of the firm, nor of the artificial person called a corporation; but it does become invested with the power to administer and distribute the fund, if required by the principles of equity. It then follows, that the court has no power to continue the business of the firm or corporation, or perform any act pertaining to either. If the members of the firm or the directors of the corporation have the means and the inclination, they, afterwards as before the seizure of their property, may continue their business. The firm may continue to carry out the purposes for which it was organized, and the corporate body

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to perform all of its corporate duties and perform its various functions.

The placing of the property or fund in the hands of a receiver, is to all intents, and for all purposes, an equitable attachment; and who ever heard of a sheriff continuing the business of the defendant in an attachment or execution, after levying on his property? The law confers no such power, nor will it tolerate its exercise. Nor does the court become invested, by attaching the property, with any more power than the sheriff. The property in either case is in the hands of the law, to answer the requirements of the law, and not for corporate, manufacturing or business purposes.

From these considerations it is perfectly apparent that the court has no power to trade upon or with the property or fund in court, nor to borrow money on or pledge the fund as security for such loans, either to augment the fund or pay the debts of the owner; and the exercise of such power can find support in no rule, principle or analogy of the common law or equity jurisprudence, that I have in my researches been able to find, nor is it conferred by the statute, nor am I aware that it can rightfully come from any other source. But when actually necessary for the preservation of the property, the court has the power to order the sale of so much, and only so much, as may be required to preserve the balance. This grows out of the duty to preserve it; but if there is money as a part of the fund, or it can be collected from dues to the fund, it should be used for that purpose, and no property sold until ordered by the final decree. This is within the powers of the court. Railroad property being somewhat different in character from that of other corporations, and such corporations having been created, more largely than others, to subserve great public interests and needs, may admit of some slight exceptions to the general rule. No well founded objection is perceived to the court permitting the receiver, in holding and preserving the property of the com-

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pany to answer the requirements of the law, to use it in operating the road, provided it does not impair or diminish the security of the lienholders, or increase the indebtedness of the company. In fact, I am unable to perceive how the court can constitute itself an agent of the company, and bind it by contracts never authorized or assented to by the company. When thus operated, all attendant expenses should be defrayed from earnings and receipts of the road.

But precedents are quoted from the Federal courts in support of the exercise of power to so operate the road, borrow money to meet such expenses, and even to furnish supplies, make repairs, and purchase rolling stock, and to pay incidental expenses, and make them a charge against the fund. But wrongly decided cases are not law, nor should they ever become binding precedents. In *Mittan's case*, 4 Coke, 33, it is said: "*Judicandum est legibus non exemplis*." That was then, and has always since been, a maxim of the law. What possible reason can be assigned why judgments should not be given according to the laws, rather than precedents? Precedents may or may not speak the law, but all know that it is not always true that they do. A precedent that has stood the test of time, and has never produced any but beneficial results, is strong evidence that it speaks the law; but a decision hastily and inconsiderately made by a bold judge, determined to relieve against a supposed hardship in the particular case, without reflecting where it will lead, or the consequences that must ensue if adopted as a precedent, should never bind other tribunals. But the tendency is to throw the responsibility on the past, and to shield ourselves under the decision of others, and to blindly follow such, and all others, as precedents, without the labor and reflection necessary to determine their correctness or fallacy. By this means, many crude decisions get into the reports, confusion is produced, and wrongs perpetrated. Hence, it is the duty of the courts to enforce the law, and not precedents, unless they speak the

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law. It has been truly said: "Precedents travel to enormous lengths." They are therefore required to be restrained and confined within the limits of the law.

But if it were possible to sustain, on legal or equitable principle, the power of the court to borrow money and make it a charge against the owner of the property, or a lien on the fund, it is impossible for me to see that it can, under any circumstances, or for any purpose, authorize the court to postpone legal, valid, unimpeachable liens on the fund, to secure the payment of debts that are not prior liens, or even liens at all, on the fund. How can it be that the court may arbitrarily override and trample upon vested rights, the obligation of contracts, and all of the safeguards the law has for ages built up and thrown around such rights? Ever since the organization of our government it has been supposed that when a person, in strict conformity to all the requirements of existing laws, obtains a right to property, or a lien upon it, there was no power in the State, its departments or functionaries, to deprive him of it, or to impair its force, or postpone it to subsequently acquired rights, without his consent, or some fault or omission of duty on his part. But here no one denies that appellants have such a lien, or claims they have omitted any duty, and yet their lien against the fund is postponed to the extent of \$149,431.51 of debts created years after they acquired their lien.

Nor can this power, by any pretence, be legally exercised under the claim that this large sum was borrowed to be used for the preservation of the fund. That is contradicted by all of the evidence in the case. Under the circumstances of this case, it is a perversion, even an abuse, of terms, to claim this large sum was borrowed or used for such a purpose. It was borrowed to pay debts incurred by the company long subsequent to the mortgage liens, which debts were in no wise liens on this fund. This is the precise case, when stripped of all immaterial and extraneous circumstances.

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The debts incurred in nowise contributed to the preservation of the fund. It but relieved the company, and not the fund, of indebtedness. All know the receiver could have safely held the property, and could have been paid for his labor, care, and necessary expenses in doing so, out of the proceeds arising from its sale. It seems to be a mere fiction to hold this large sum was raised to preserve the property, and had its preservation been necessary, there was not the slightest occasion to borrow the money.

Would not all men have been profoundly astonished had the circuit court decreed that the master in chancery should levy upon and sell a sufficient amount of the property of appellants to raise \$149,431.51, and to apply it in payment of the debts that were discharged by the court? And in principle and law where is there a difference? Appellants were in nowise liable for the debts, and these were certainly, if any lien on the fund, in no sense superior, or to be preferred to theirs, unless it was the taxes on the property in the custody of the court. Then why should the court appropriate \$149,431.51 of the fund on which they had a first lien, and deprive, or rather take from them, that many dollars to pay those debts? In what does or can it differ in principle from seizing one man's property to pay another man's debts, for which he is not in the slightest degree liable? It can not be denied that the court below took from the fund to which appellants, according to every known rule or principle of justice, were entitled, and paid it to creditors who had no claim to or interest in the fund or money thus taken. Appellants had no better or higher title to the money in their pockets than to their lien on this fund. No kind of sophistry or false reasoning can overcome this proposition.

It, however, may be said that when a railroad is thus placed in the hands of a receiver great public interests are involved. This is no doubt true. And it is also urged that it behooves the courts to devise some means to protect those great inter-

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ests. It surely can not be the duty of the courts to despoil private individuals of hundreds of thousands of dollars of their fortunes to protect the public interest and convenience. It would seem to be far juster that the public, rather than appellants, should pay for the protection of such interests. Appellants only owe a common duty to the public, and if, as good citizens, they discharge that duty, the public has no further claim on them. Then why take from them \$149,431.51, and bestow it on the public? There is nothing to show they have done any act that worked a forfeiture of this large sum of money, and if there was, this is not a proceeding for the purpose of enforcing it, or in which it could be declared and enforced. If there be the supposed great public inconvenience, let the public provide for it by appropriate legislation, and even constitutional amendment, if needful, but let the courts refrain from visiting the consequences and the great burthen on a few private individuals.

For these, and other reasons I might adduce, I am unalterably convinced the circuit court was utterly powerless to borrow a dollar of money, or to pledge the fund for its payment, or to create any lien, and that it was absolutely without the semblance of power to divest appellants of their vested rights to their prior lien, and to do so was to destroy such rights, and to impair the obligation of a contract as valid and as solemnly entered into as any known to the law, and as fully entitled to legal protection as any right known to it.

I shall now consider whether the circuit court erred in making distribution of the fund. No objection is perceived to paying the costs out of the general fund. Such is the general practice in administering such funds.

Had the court possessed the power to create a lien, and had the decree made these sums a first lien on the personal property embraced in the chattel mortgage, then it might have been contended, under the authority of the cases of

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Gregg v. Sanford, 24 Ill. 17, *Titus v. Mabee*, 25 id. 257, and *Hunt v. Bullock*, 23 id. 320, that the deeds of trust were not executed, acknowledged, registered and recorded in conformity to the Chattel Mortgage law, and were void as a chattel mortgage, and therefore never became a lien on the personal property; or it might have been claimed and shown that none of the personal property was in existence when the deeds of trust were given, and under the authority of 1 Parsons on Contracts, 437, and *Robinson v. McDowell*, 5 Maule & Selw. 228, the trust deeds did not attach to or become a lien on after-created or purchased personalty; but on the contrary, the decree declares the sums thus borrowed under its requirement, a lien on all of the property, and to be preferred to all other liens. Nor in the final order of distribution does the decree require these debts incurred by the court to be confined in their payment to the proceeds of the personal property. Had it done so, it is probable appellants would have had no right to complain, as they had, under these authorities, no lien on the personal property. Nor will I here stop to inquire whether appellants did not have, as lien creditors, an equal right to participate with the general creditors, including the holders of the second mortgage bonds, in the proceeds of the sale of the personal property, as there are other and abundant grounds for a reversal.

It may be said that there is nothing to show that there were not ample means arising from the sale of the personal property to pay these debts. We can not know that such proceeds amounted to more, if so much, as \$1000. The court below should have, through the receiver, ascertained the amount for which it did sell, and have confined the participation of these debts to that fund alone, if it is possible to hold that they should be paid. In this there was clear and manifest error.

It is urged that appellants are estopped to deny that this \$149,431.51 loan, under the order of the court, is not a lien

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preferred to that of the two mortgages. The first ground of estoppel claimed is, that the trustees named in these mortgages were parties to the suit, and consented that this new indebtedness might become a preferred lien to that of the trust deeds, and that they should be postponed. The law is familiar, well settled, and I believe has never been questioned, that a trustee can never bind his *cestui que trust* by any act not within the scope of his authority. He is powerless to permit waste, or to destroy the trust property or fund, or to impair its title. Here the deeds of trust can not be so tortured as to confer a particle of power on the trustees to release or postpone the lien of the trust deeds to junior claims to those of the bondholders. Their power was to receive the money due the bondholders, or in default of payment, to sell the property and pay over the money, and their duty required them to preserve the fund and lien of their *cestuis que trust*. So far from having power to bind the bondholders, they were acting without authority, and in flagrant violation of their duty, and it would be monstrous injustice to hold the bondholders bound by their unauthorized act, performed in violation of their plain duty. It is true, they were the trustees for the bondholders, but the trust deeds conferred no such power, and the deeds were on record, and notice to all persons dealing with the trust fund. Had the parties making these loans under the decree of court, examined the records, they would have found the trust deeds had become liens years before, and the trustees had no power, at any time, for any purpose, or for any amount, to postpone these liens. The fact this was a fund in court, notified all persons that there were liens on the fund, otherwise the court could not have had the fund in its custody. Having such notice, those who loaned their money on this fund were guilty of gross negligence in failing to learn the nature and extent of the liens, before parting with their money.

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It is next urged, that as the trustees were made parties to the suit, the bondholders should be considered as parties, and bound as though they had been in court. The position is certainly novel, especially where we find the trustees, instead of protecting the rights of the bondholders, endeavoring to release and depreciate their security. This case strongly illustrates the necessity of having the beneficiaries before the court, when their interests are involved. Here the trustees endeavored to release to others over \$149,000 of the fund pledged to pay a debt of more than double the value of the fund thus pledged. This demonstrates the wisdom of the law requiring all parties in interest to be before the court.

It is urged that the directors of the company, by resolution, authorized the \$81,600 to be borrowed, and the personal property of the company to be mortgaged to secure its payment, and the bondholders are thereby estopped, and it thereby became a preferred lien to those of the trust deeds. How, it may be asked, can a mortgagor, by executing a second mortgage, and consenting or agreeing with the second mortgagee to give him a preferred lien to that of the first mortgagee, possibly change the rights of the first mortgagee? Would not its maintenance violate the simplest principles of the law, and every dictate of reason and plainest requirements of common justice? If any of the directors were bondholders, to the extent of their interest it would amount to a waiver of their first lien on the property embraced in the chattel mortgage; but by no rule of which I am aware could it be held to release or postpone their lien on other property, nor could it affect the lien of any other bondholder. Allen swears that at that meeting three-fourths of the bondholders were represented. The expression is indefinite, as he does not explain in what manner they were represented. But even suppose the directors then present held three-fourths of the bonds, that could not, in the slightest degree, affect the rights of the

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holders of the other fourth. To so hold would violate all known rules of law. The action of the board at that meeting did not impair or postpone the lien of holders of the fourth of the bonds not represented, or any property to which their lien had attached; but by the decree of the circuit court it was held it did, and in this there was gross and palpable error. All that can be justly claimed for that resolution is, that it postponed the lien of the bondholders then present, but only on the property embraced in the chattel mortgage, and nothing more, as already seen; but the circuit court held that it postponed the mortgage liens on all of the property. In this part of the decree there was gross error.

But it is said that appellants purchased their bonds *pendente lite*, and after the order for receiver's certificates to issue had been made, and they took in precisely the same condition Constable, from whom they purchased, held the bonds. This is no doubt true; but how did Constable hold the bonds? The court had made an order to borrow money without authority. It had, without authority, decreed such certificates should be a preferred lien to the first and second mortgage bonds. Nor did, as we have seen, the trustees, by betraying their trust, have any power to consent that the liens of the first and second mortgages should be postponed. This decree was reversible when, under our practice, it could be presented for review; and Constable not being a party to that decree, was not bound by it, and he not being bound, appellants could not be by purchasing of him. In this there is nothing that bears the remotest resemblance to an estoppel.

But counsel say Constable was a director, and owned the bonds now held by appellants, and voted to borrow the \$81,600, and mortgage the personal property of the road to secure its payment; that he thereby postponed the lien of these bonds to that of the chattel mortgage, and appellants having afterwards purchased the bonds of him, took them with the same estoppel that prevented Constable from claim-

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ing these bonds were a prior lien to the chattel mortgage. To this proposition there are several conclusive answers: First, these bonds were not due, and there is no evidence that appellants had the slightest information that such a resolution was adopted by the directors, hence they were not bound by the resolution.

Again, the resolution can not, by any ingenuity, be tortured into anything more than a release of the lien of these bonds on the personal property to the extent of the sum of \$81,600. As well say, a man, having a mortgage on two tracts of land, who releases or postpones his mortgage lien on one tract in favor of a junior lien, releases or postpones his lien on both tracts. The only possible effect of Constable's vote in favor of the resolution was to postpone any lien he held by his bonds on the personal property, but on nothing else. It is impossible to see how he, by voting for that resolution, could be held to have consented that the court should borrow \$67,831.51 more, and make it a preferred lien on all of the property over all prior liens, or by what process of reasoning it can be said that his vote could postpone the lien of the bondholders under the second mortgage. Yet the decree does make both of these sums a preferred lien to all others, and ordered them to be first paid. Moreover, the decree authorizing the loan on the certificates was not supported by law, and was erroneous, and it can not be held that he, by that vote, intended to release all errors in all decrees that might be rendered in any suit that might thereafter be brought in reference to the mortgaged property; and if he had not released such errors, on what pretense can it be held appellants have released the error?

Again, complaint is made that to give appellants their just and legal rights will work great hardship on the holders of these certificates, especially as they relied on the decree of the court to give them a first lien. They were loaning money

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created as can be done by the forms of the law. These mortgages were on record, and they are conclusively presumed to have known the fact and all they contained, and they are presumed to have known the law, and if so, they must be held to have known that it did not sanction the decree, and that it was reversible. The negligence, then, was theirs, and not that of Constable and appellants. The court has no power to deprive parties of their just, legal and equitable rights, and confer them on others merely to relieve against hardships. To do so would abolish the administration of justice according to law.

But conceding that the court had the power to direct the receiver to issue certificates, and borrow this money to relieve the personal property from the chattel mortgage and other liens, and to pay debts, etc., it was manifest error not to have confined the payment of the certificates exclusively to that property and its proceeds. But I hold the court had no power to order the borrowing of money, or to make it a lien on this or any other property. I further hold courts are not, nor can the law permit them to become, money changers, and borrow and loan money, buy and sell commercial paper, and transact a general brokerage business. It may be said this is not of that character of business. If the court may borrow money because it conceives it to be for the interest of the parties litigant, why not, for the same supposed reason, loan their money for profit, buy their paper, or that of other parties, at a discount, thus advancing their interest, and thus take its litigants under its paternal care? If it may borrow money, it is but a short step to all of the other acts, and they can be justified on precisely the same grounds and for the same reasons. Far better leave it to the legislature, in whose province the power is found, to afford a remedy, if needed. The courts are not invested with such corrective legislative power.

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If it be urged that appellants should have resisted the decree of the court requiring the receiver to borrow the money and issue his certificates, it may be asked how they could resist, as they were not parties when the decree was passed, nor does it appear they had the slightest notice of the proceeding. Then, on what principle hold them estopped from asserting their rights? It has generally been understood that a man can not be estopped unless he is fully informed of the facts, and assents, or fails to protect his rights, to the injury of others; and the never-questioned doctrine is, that no person can be bound by a judgment or decree unless he is a party to the proceeding, and has opportunity to assert his rights, or he claims in privity with one who has had such opportunity. If appellants must be held estopped because they failed to appear and resist the order, under the circumstances of this case, it must be upon some rule of which I have no knowledge, nor can such a rule be shown. Shall we deliberately hold that a person having a lien on, or having an interest in, property or a fund, shall be deprived of his unquestioned and unassailable rights in it because he fails to appear and defend them when involved in a suit to which he is not a party, and this, too, when he has been guilty of no wrong, or the omission of any duty? Is it possible to maintain such a doctrine without overturning principles that have not been questioned for ages, or perhaps are so simple and eminently just that they never were questioned? No rule ever announced requires a person having such a lien to seek all persons and inform them of the fact. The recording law does that for him.

Again, in making distribution the circuit court refused to first satisfy unpaid coupons for interest, when other coupons of the same series had been paid, and thus equalize all bondholders in the amount of interest received, before making the general distribution. In cases of this character equality is equity. A portion of the bondholders had received payment

Mr. Justice WALKER, dissenting.

of installments of interest, when others had received no interest on these installments. In this manner some of the bondholders received more than a *pro rata* share of the fund. Each bondholder had an equal right in equity to share in the fund. The fund was inadequate to pay the full amount of the first mortgage bonds, and no principle of equity is clearer than in such a case all have equal equities, and are entitled on its distribution to share in it *pro rata*. As the fund was distributed, a part of the bondholders received of the fund more than their proportionate share, and this was manifest error. The trust was created to secure all of the bondholders of the same class alike, and each one had an equal lien on the same fund to secure his bonds and interest, and when the fund proved insufficient to pay all, it is incomprehensible how one portion of the bondholders, having no superior equities, should receive of the fund more than their *pro rata* share in the distribution.

I have, I think, shown that beyond all doubt the decree of the circuit court is manifestly erroneous, and should be reversed. Were not my convictions so thorough that this decision is wrong, I should not have troubled the profession with these hastily constructed views, and had my official duties permitted, I should have given more thought and reflection, and presented other reasons, for my dissent; but the importance of the questions seemed to call for my adverse views before the case becomes a precedent.

Syllabus.

THE WROUGHT IRON BRIDGE COMPANY OF CANTON, OHIO,

v.

COMMISSIONERS OF HIGHWAYS OF TOWNS OF UTICA AND DEER PARK.

Filed at Ottawa September 26, 1881—Rehearing denied March Term, 1882.

1. **EVIDENCE**—*under general issue in assumpsit.* Under the general issue in assumpsit it devolves upon the plaintiff to prove the defendant's promise, as charged in the declaration, by direct proof, or to show by the evidence a state of facts from which the law will imply such premise.

2. **PLEADING**—*sufficiency of declaration admitted by pleading the general issue.* By pleading the general issue in assumpsit the defendant, as a general rule, impliedly admits the legal sufficiency of the declaration, and the right of the plaintiff to recover upon proof of the facts therein charged. But there are cases in which, notwithstanding this implied admission, the declaration will be insufficient to support a judgment for the plaintiff.

3. **APPEALS**—*reviewing questions of fact by Supreme Court.* The decision of the Appellate Court upon all questions of controverted fact is made final and conclusive upon this court by the statute, except as to certain classes of cases enumerated therein.

4. The statutory provision making the judgments of the Appellate Courts "final and conclusive as to all matters of fact in controversy," embraces not only the principal facts upon which a right to recover is claimed, but also the evidentiary facts, or facts which are mere evidence of the principal facts,—in other words, it includes the ultimate facts to be proven on the trial, together with all subordinate facts offered as evidence of their existence.

5. **SAME**—*inference as to the facts from a finding against plaintiff.* Where an issue of fact is found against the plaintiff by both the circuit and Appellate courts, the legal inference is that the plaintiff failed to prove the principal facts upon which his right to recover rested,—in other words, that the evidentiary facts did not sustain the principal or ultimate facts.

6. **SAME**—*decision of Appellate Court not conclusive on questions of law.* If, during the progress of a trial, the court improperly admits or excludes evidence, or otherwise commits error, except in passing upon questions of fact in its final determination, and such erroneous ruling or other error is preserved in the record, and the Appellate Court fails to correct it, it may be done in this court.

7. **PRACTICE**—*mode of presenting and preserving questions of law on a trial by the court.* On a trial by the court alone, if the counsel has any doubt as to the correctness of the view of the law of the case as held by the court, he should prepare and submit written propositions of law as he

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understands it, to be held or refused by the court, and thus preserve for review any erroneous view of the law applicable to the case which the court may entertain.

8. *SAME—general objection to evidence—what it will embrace.* Objections of a general character to the admission of evidence will be regarded as going only to its competency or relevancy.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of La Salle county; the HON. GEORGE W. STIPP, Judge, presiding.

Mr. E. F. BULL, for the appellant.

Messrs. MAYO & WIDMER, for the Commissioners of the town of Utica.

Mr. G. S. ELDRIDGE, Mr. H. T. GILBERT, and Messrs. LAWRENCE, CAMPBELL & LAWRENCE, for the Commissioners of the town of Deer Park.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This was an action of assumpsit, brought in the La Salle county circuit court, by the Wrought Iron Bridge Company of Canton, Ohio, against the Commissioners of Highways of the towns of Deer Park and of Utica, to recover an indebtedness alleged to be due from the latter to the former, on account of the erection and construction of a wrought iron bridge over the Illinois river, which is the dividing line between the two towns.

The declaration contains three counts, the first and third special, the second general. The third count sets out with great particularity the facts relied on for a recovery. To this declaration the plea of *non assumpsit* alone was interposed, and by agreement of parties the cause was tried by the court without the intervention of a jury, resulting in a finding and judgment for the defendants, which, on appeal

Opinion of the Court.

to the Appellate Court for the Second District, was affirmed, and thereupon the plaintiff in the action, by further appeal, brought the cause to this court.

Under the pleadings thus formed it devolved upon the plaintiff to establish the defendants' promise, as charged in the declaration, by direct proof, or to show by the evidence a state of facts from which the law would imply such promise. In either case the controversy involved in the issue formed turned upon the existence or non-existence of certain facts, for by pleading the general issue the defendant impliedly admitted the legal sufficiency of the declaration, and the right of the plaintiff to recover upon the proof the facts therein charged. It is true that a case might occur where, notwithstanding such implied admission, the declaration would be legally insufficient to support the action, in which case the judgment should of course be for the defendant, let the evidence be what it might. But it is not claimed that any such case is presented by the present record. The legislature, whether wisely or unwisely, has provided in emphatic terms that this court, when exercising its appellate jurisdiction in cases like the one before us, shall review the judgments and rulings of the court below upon questions of law only. Except in certain classes of cases, to which the present case does not belong, the decision of the Appellate Court upon all questions of controverted facts is made final and conclusive, and in this respect the jurisdiction of the Appellate Court is superior or more extensive than the jurisdiction of this court, though with respect to all other matters reviewable here it is an inferior court.

Since this court, then, is not permitted to review questions of fact, it is important in giving practical effect to the statute to have a clear conception of what is meant by questions of fact, as contradistinguished from questions of law. Whatever occurs or exists is properly termed a fact, hence facts are distinguished as being either conditions or states of things and events. They are also distinguished as either physical

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or psychological. But when considered with reference to the office which they perform in, and the relation they bear to, the trial of a cause in a court of justice, the most important subdivision of facts, so far as the present inquiry is concerned, is that which distinguishes them into "principal" and "evidentiary." The plaintiff in every action either assumes or expressly charges upon the record the existence of certain facts, upon the proof or admission of which his right of recovery depends. These facts thus assumed or directly alleged to exist are the principal facts pertaining to the suit. Sometimes they are established or proved by direct testimony, but they are often—indeed most generally—established by the proof of other facts, from which their existence is inferred. The latter being mere evidence of the principal facts are properly designated as evidentiary facts, and are so known to the law. Both of these classes of facts we understand to fall within the statutory provisions that make the judgments of the Appellate Court "final and conclusive as to *all matters of fact* in controversy." In short, we understand that the ultimate facts to be proven on the trial, together with all subordinate facts offered as mere evidence of their existence, fall within the general statutory description "all matters of fact in controversy," and as to such matters the statute declares the judgment of the Appellate Court shall be final. The ultimate propositions to be proven, the evidence submitted in support of them, the finding of the trial court on those propositions, and the judgment of the Appellate Court upon such finding, are matters which this court is not permitted to review, where no exception has been taken or question of law has otherwise been preserved upon the record.

In this case, as we have already seen, there was simply an issue of fact formed between the parties, and that issue was found by both the circuit and Appellate courts against the plaintiff. The logical as well as the legal conclusion to be drawn from such finding is, that the plaintiff failed to prove

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the principal facts upon which its right to recover rested,—in other words, the evidentiary facts did not sustain the principal facts. But it may be urged, as it often is in cases of this kind, that by looking to the record this court will see that the issue of fact ought to have been decided the other way—that the evidence showed a clear and unquestioned right of recovery in the plaintiff. Concede this to be so, what does it prove? Simply that the trial court found the issue in favor of the defendants, when it should have found it against them, and that the Appellate Court, the only legal tribunal authorized to correct that error, has failed to do it, and here the matter must end, in the same way as if the error had been committed by this court. And there is no hardship in this which is not liable to occur under any system of laws, for all courts of final resort occasionally err. The law having made the decision of the Appellate Court final and conclusive on all issues of fact in cases of this kind, this court has no right or inclination to interfere. To do so would be a palpable violation of law.

If, during the progress of a trial, the court improperly receives or excludes testimony, or otherwise commits error, except in passing upon questions of fact in its final determination, and such erroneous ruling or other error is preserved in the record, and the Appellate Court fails to correct it, it may be done in this court. So, in a case like this, if counsel is in doubt as to whether the court's views of the law as applicable to the case before it are correct, he may, under an express provision of the statute, prepare and submit to the court written propositions of law as he understands to be applicable to the case, to be held or refused by the court as the court may think proper, and in this manner preserve for review any erroneous view of the law applicable to the case which the court may entertain. Nothing of this kind has been done in this case. It is true a number of objections were made by appellant to the admission of various portions

Syllabus.

of the testimony, but these objections all appear to be of a general character, and can only be regarded as going to the competency or relevancy of the testimony. In the light of the pleadings, and the evidence admitted on behalf of the plaintiff, we are unable to say that any material error was committed by the circuit court in receiving testimony on behalf of the defendants.

The argument of counsel on both sides seems to be directed almost exclusively to the question whether the facts appearing in evidence are legally sufficient to warrant a recovery. Both the lower courts have decided this question in the negative, and as we have already seen, the decision of the Appellate Court must be accepted as final and conclusive on that question.

Judgment affirmed.

HORACE A. GOODRICH *et al.*

v.

HENRY ROGERS *et al.*

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

1. USURY—*money advanced—reserving a share of profits and sharing in losses.* Where a party advances to another capital with which to engage in business in the name of the former, under an agreement that the party carrying on the business is to receive \$50 per month, and each is to receive one-half of the net profits, subject to losses, the transaction is not usurious, though the lender may thereby in fact receive more than the rate of interest allowed by law to be reserved, on his advance, as he takes the hazard of a loss from the business.

2. Where a loan is made and the lender receives a share of the profits in an adventure, which is greater than the legal rate of interest, but is responsible for losses, the transaction is not usurious, though it might be so regarded if he were not liable for losses.

Brief for the Appellants.

APPEAL from the Appellate Court for the First District;—
heard in that court on appeal from the Superior Court of
Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. F. W. FORCH, JR., and Mr. WALTER G. GOODRICH, for
the appellants, after stating the facts of the case, made
among others the following points:

1. The circumstances, the conduct of the parties, and
the business, the terms and language of the contract, prove
this to have been a sale, notwithstanding the asserted under-
standing of Smith and Knight that it was a loan. *Price v.*
Karnes, 59 Ill. 276; *Pitts v. Cable*, 44 id. 103; *Hanford v.*
Blessing, 80 id. 188; *Colton v. Dunham*, 2 Paige, 267.

The essential elements of a loan are wanting in this case.
In the case of *Murray v. Harding*, 2 Wm. Black. 860, the
chancellor says: "It is essential to the nature of a loan
that the thing borrowed is at all events to be returned." *Hall*
v. Daggett, 6 Cowen, 653; *Tyler on Usury*, 98, 172; *Ord on*
Usury, 23.

The payment of the money alleged to have been borrowed
being at the will of Smith, and not obligatory on him, one of
the essential elements of the loan is wanting in this contract.

2. If the transaction can be construed as a loan, it was
not usurious. There is no contract to pay illegal interest.
If the principal and interest be put at hazard, there can be no
usury. *Tyler on Usury*, 99; 2 *Parsons on Notes and Bills*,
442; *Colton v. Dunham*, 2 Paige, 267; *Spencer v. Tilden*, 5
Cow. 144; *Holmes v. Wetmore*, id. 149; *Morisset v. King*, 2
Burr. 891; *Cummings v. Williams*, 4 Wend. 680; *Stevenson v.*
Unkefer, 14 Ill. 103.

When one puts money, and the other credits or services,
into a business, to be paid for out of the profits only, they
are partners; and in a partnership there can never be usury,
however great a share may be allowed one partner for what
he contributes, because the return is contingent upon profits,

Brief for the Appellees.

and the loss of his contribution is hazarded by his liability for the debts. *Robbins v. Laswell*, 27 Ill. 365; *Grace v. Smith*, 2 W. Black. 100; *Leggett v. Hyde*, 58 N. Y. 272.

Messrs. McCONNELL, RAYMOND & ROGERS, for the appellees :

1. The court can look beyond the color and form of the transaction to determine its character. *Lawley v. Hooper*, 3 Atk. 278; *Robinson v. Cropsey*, 6 Paige, 480; *McGill v. Ware*, 4 Scam. 21; *Bishop v. Williams*, 18 Ill. 101; *Sutphen v. Cushman*, 35 id. 186; *Cooper v. Knoch*, 27 id. 301; *Reinback v. Crabtree*, 77 id. 182; *Mitchell v. Preston*, 5 Day, 100; *Koyer v. Edwards*, Cowp. 114.

2. Granting that there was no stipulation to return the money, the transaction was usurious. A stipulation that the money may be returned is sufficient. Tyler on Usury, 96, 101; *Scott v. Lloyd*, 9 Pet. 418; *Lawley v. Hooper*, 3 Atkins, 278; *Mitchell v. Preston*, 5 Day, 100; *Robinson v. Cropsey*, 6 Paige, 480.

3. Even if the court should consider that the transaction made Goodrich liable for the debts, it was usurious. Hazard must be more than colorable. The contingent insolvency of the borrower is no hazard. Contingent liability for the debts, if the borrower stands between the loaner and the creditors, is no sufficient hazard. *Morse v. Wilson*, 4 T. R. 353.

4. A division of profits does not necessarily constitute a partnership, and subject a person entitled to share in them to a liability to creditors. A share of profits may be taken as compensation for service, or for use of money. *Lintner v. Milliken*, 47 Ill. 178; *Adams v. Funk*, 53 id. 219; *Burton v. Goodspeed*, 69 id. 237; *Smith v. Knight*, 71 id. 148; *Parsons on Partnership*, 72; *Story on Partnership*, sec. 49; *Harvey v. Childs*, 28 Ohio St. 319; *Campbell v. Dent*, 54 Mo. 325; *Rice v. Austin*, 17 Mass. 197.

5. If the profits of a business, or the use of a pledge, amount to more than legal interest, the transaction is usuri-

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ous. *McGinnis v. Hart*, 4 Bibb, 327; *Richardson, Admr. v. Brown*, 3 id. 207; *Morse v. Wilson*, 4 T. R. 353; *Galloway v. Legan*, 4 La. (N. S.) 167; *Succession of Lavinia Hickman*, 13 La. Ann. 134.

Mr. CHIEF JUSTICE CRAIG delivered the opinion of the Court:

In April, 1878, Rogers and Smith owned a stock of drugs and the fixtures of a drug store, and were engaged in business on South Clark street, Chicago. The firm was badly involved, and unable to pay its liabilities. On the 20th of April a judgment by confession for \$1021 was rendered against the firm, in the Superior Court of Cook county, in favor of John B. Knight, Jr., on a note which had been indorsed to him by J. G. Rogers. An execution was issued on the judgment, and levied on the entire stock and fixtures, which on the 18th day of May were sold, and bid off by Knight. It appears that the store and fixtures were removed to the Grand Pacific building, and the business there carried on by Smith, as Knight's agent. While the property had been purchased by Knight, and was held in his name, it appears from the evidence that he only held it as security for a debt of some \$800 due his father from the firm.

On or about the 18th day of January, 1879, an arrangement was made between Smith, Knight, and Walter G. Goodrich, under which the property was transferred to Goodrich, and Knight received his pay. This transfer was made by a written bill of sale, which was executed by Knight, and passed over to Goodrich. At the same time a written contract was made between Goodrich and Smith, under which Smith agreed to carry on the store for one year, for \$50 per month and fifty per cent of the net profits of the business. The agreement also provided that at the end of the year Smith had the privilege of purchasing the business, stock of drugs, and fixtures, by paying \$1500 over and above the profits for said year. After the making of the bill of sale and the

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last named agreement, the business was carried on in the name of Goodrich, Smith acting as clerk or agent.

The terms of the contract under which Knight transferred the property to Goodrich are in dispute between the parties. Rogers and Smith claim that Goodrich agreed to loan them \$1500 for one year, and he was to receive one-half of the net profits as interest on the money loaned, and that the bill of sale was executed by Knight, at their request, as security for the loan, while on the other hand Goodrich claims that he refused to make a loan, but that he purchased the property for \$1500, and at the same time agreed with Smith to employ him to carry on the business, under his supervision, for one year, and to pay him a salary of \$50 a month and one-half of the profits, and give him the privilege of purchasing the property for \$1500 at the end of the year.

The first question to be determined is whether the transaction between the parties is to be regarded as a loan, and this question is not free from doubt. Knight made an absolute sale of the property to Goodrich, which was proven by a written bill of sale, absolute in its terms. Goodrich testified that he refused to make a loan, and never in fact made a loan, but purchased the property for the sum of \$1500. In addition to this evidence, there was no contract or agreement by which Rogers and Smith, or either of them, ever agreed, at any time or in any event, to repay Goodrich the money he advanced. Smith, it is true, had the right, at the end of one year, to repurchase the property upon the payment of \$1500, but he was under no obligation whatever to do so unless he saw proper. On the other hand, Smith testified that Goodrich, after refusing a chattel mortgage and personal security, made this proposition: "That if I would give a bill of sale as security for the loan, he would make the loan, provided I would allow him one-half of the net profits as interest on the money. He might not have used the word interest, but he said if I would give him a bill of sale he would

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advance me \$1500, that I was to have, and he was to have one-half of the net profits." Knight, in his evidence, says: "I have heard a good deal of talk about it. I got the impression—I don't remember the absolute words—but I got the impression all through that it was a loan." This is the substance of the evidence bearing on the question whether the money furnished by Goodrich can be regarded as a loan, and it leaves the point in much doubt.

But conceding that the transaction was a loan of \$1500 made by Goodrich to Rogers and Smith, the inquiry then is whether the contract was usurious. The circuit court held that it was, and this decision was affirmed in the Appellate Court. The substance of the contract is this: Goodrich furnished \$1500 and purchased the stock of goods and fixtures. He agreed to give Smith \$50 per month and one-half of the net profits of the business to carry on the store for one year, in the name of, and on the credit of, Goodrich. Upon the expiration of one year Smith had the right to purchase the property by paying \$1500 over and above the profits of the business. There is no pretence that this contract is usurious on its face. Indeed, it does not provide for the payment of any interest whatever, nor for the principal sum advanced, but the argument is, as we understand it, that one-half of the profits arising from the business, which, under the contract, would go to Goodrich, exceeded in amount ten per cent interest on the \$1500, and hence the agreement was within the statute in force at the time the contract was made, which prohibited a person from receiving any greater sum than ten per cent for the loan of money. It is true that one-half of the profits arising from the business exceeded ten per cent on the \$1500 which Goodrich advanced for the goods, but does that constitute usury, within the meaning of the statute?

In disposing of this question it must be remembered that the \$1500 advanced by Goodrich was not actually at interest,

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but employed in business where it might make profits or suffer losses. We do not understand that our statute was ever intended to prevent one person from furnishing capital to another with which the two might embark in trade, although the person advancing the capital might receive profits greatly in excess of the rate of interest allowed by law. In such a case, where he takes the hazard of losses arising from the business, there can be no usury. This principle is well expressed in *Anderson v. Maltby*, 2 Ves. Jr. 248, in these words: "An advantage to be taken out of trade may be measured in any way agreed on, for the money is not lying at interest, but employed in making profits, subject to losses." Here, Goodrich embarked in a new adventure,—in a speculation,—which might prove profitable or might result in heavy losses. The business was carried on in his name. Whatever loss might ensue he was responsible, although it might consume the money advanced and as much more. Under such circumstances we fail to see how it can be said any rate of interest whatever was reserved. It may be conceded that if the lender should receive a certain share of profits of a business, exceeding the legal rate of interest, and was not liable for losses, the contract might be regarded usurious, as held in *Morse v. Wilson*, 4 T. R. 353. But where a loan is made, and the lender receives a share of the profits which is greater than the legal rate of interest, but is responsible for losses, the transaction can not be held usurious. *Morisset v. King*, 2 Burr. 891.

Hall v. Daggett, 6 Cowen 655, is a leading case on this subject, where it is expressly held that a contract can not be held usurious where the lender is liable for the losses incident to the business. In *Stevenson v. Unkefer*, 14 Ill. 103, where it was contended that a note payable in Baltimore bank notes, with twelve and one-half per cent interest, was usurious, it was held that where the creditor takes a risk by which he runs the hazard of losing the principal sum, or of taking

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less than the sum originally due, with lawful interest, it is not usurious to stipulate for or receive more interest than is prescribed by the statute. The same principle was decided in *Spain v. Hamilton's Admr.* 1 Wall. 604, in which it was held that where the promise to pay a sum above legal interest depends upon a contingency, not upon any happening of a certain event, the loan is not usurious.

Here there can be no question in regard to the fact that Goodrich took the risk of not only losing all interest, but the principal sum advanced as well. Whether he would ever receive a dollar in return for the money advanced, depended entirely upon the success of the business. If the adventure proved profitable, he might receive a legal rate of interest, or even more, from the profits. If, on the other hand, the business was not well managed, or goods declined in the market, or bad debts were made, he might receive nothing whatever, either as interest or principal. Where such a contingency exists, the transaction can not be held to be tainted with usury. The law of the State which prohibits the loaning of money at a high rate of interest was doubtless enacted for a wise purpose, and when enforced in cases which fall within its provisions, it may work beneficially to all classes of society; but to hold that the facts of the present case fall within the provisions of the statute, would in many cases prevent men with good business capacities from obtaining money to engage in business from those who had capital to advance, provided they could share in the profits of the enterprise. Such a decision in our judgment, might have a direct tendency, in many cases, to stifle business and retard the commercial interests of the country.

The decision of the Appellate Court will be reversed, and the cause remanded, with directions to reverse the decree of the circuit court.

Decree reversed.

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MR. JUSTICE MULKEY: I do not concur in the conclusion reached in this case by the majority of the court. I am of opinion the transaction was a mere subterfuge to cover usurious interest, and that the judgment of the Appellate Court should therefore be affirmed.

MR. JUSTICE DICKEY: I agree with Mr. JUSTICE MULKEY. The written contract was not the real agreement of the parties. If it were, it was not the case of a loan. The writing, I think, was a mere device to cover the real transaction, by which the lender was to receive his principal, and for the use—a larger amount for its use than the law allows.

MR. JUSTICE WALKER: I do not, under the facts in this case, think this was intended as a loan, and hence is not obnoxious to the usury laws. Had this form been adopted as a mere cover for usury, it would have been otherwise. But I think that is not shown.

ALBERT PAUL SMITH *et al.*

v.

FRANKLIN DENNISON, Receiver, etc.

*Filed at Ottawa June 30, 1881—Rehearing denied September Term, 1881—
A second petition for rehearing dismissed March Term, 1882.*

1. EVIDENCE—*credibility, when contradictory statements are shown.* Although contradictory statements by a witness as to immaterial matters may tend to cast suspicion upon his testimony, they will not authorize its entire rejection, when he is corroborated by another witness, and not contradicted by any other evidence in the case.

2. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*what constitutes—rights under a transfer as between partners.* Where one partner transfers and delivers to another all the assets of the firm, to collect the debts due the firm and pay and discharge its liabilities, giving such managing partner

Statement of the case.

all the powers possessed by both, for the purpose of settling the partnership affairs and a division of the proceeds after payment of the debts, this is not an assignment for the benefit of creditors of the firm, but one for the benefit of the parties, and will not prevent the partner taking the assignment from securing one creditor to the prejudice of others.

3. *COLLATERALS*—*may be given to secure more than one debt.* Where a firm has given collaterals as security for a loan, and procures a further loan upon additional collaterals, the firm may, in obtaining such new loan, contract with the person advancing the money that he may hold the securities as collateral to both debts, or his entire claim.

4. *PARTNER*—*his power to pledge collaterals for money.* Where one partner entrusted with the winding up of the business of the firm was authorized, by agreement, to trade any part of the assets, and to do all and everything for settling its affairs that might be deemed expedient, it was *held*, that such partner was authorized, on borrowing money to pay a liability of the firm, to pledge notes of the firm as collaterals to secure not only the new indebtedness so created, but also a prior indebtedness of the firm to the same creditor.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. S. M. MOORE, Judge, presiding.

Frisbie and Rappleye were partners, doing business as such, in Chicago. John Seely Wallace was the father-in-law of Rappleye. The firm borrowed money from Wallace, and having made some payments had a settlement with Wallace, and on the 28th of December, 1875, found the balance due Wallace was \$7662.44, and on that day gave him the note of the firm for that amount, payable in ninety days, with ten per cent interest until paid, and at the same time deposited with him other notes of other persons as collaterals to secure the payment of the note to Wallace.

On the 18th of April, 1876, this firm stopped business, and an agreement was executed between Frisbie and Rappleye that Rappleye should wind up the business, collect the assets, and from the proceeds pay the firm debts, if the assets were sufficient; that in payment of the debts, when any assets

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can, in the judgment of Rappleye, be better disposed of without first being converted into money, or can be traded to secure that end, he shall pursue that course; and finally agreed that all the assets and property should be turned over to Rappleye, and declared that the same were thereby transferred, indorsed and assigned to him, "as trustee, for the purposes mentioned," that is to say, "realizing the most out of the same, and paying the debts;" and Frisbie authorized Rappleye "to do all and every the matters and things that may be necessary or expedient in settling the affairs of the firm;" and that after the payment of all of the debts the balance of the money or assets on hand should be divided equally between the parties. Frisbie was to give his advice and assistance in the settlement of the affairs, and neither of them should charge or receive any compensation for his services.

On the 20th of April, 1876, the firm having not long before collected money as agents of an eastern insurance company, and improperly applied the same to their own use, Rappleye borrowed from Wallace \$4539.16 for the purpose of discharging that liability of the firm to the insurance company, and gave to Wallace a promissory note, signed "Frisbie & Rappleye," for that amount, payable on demand, with interest at the rate of ten per cent per annum until paid, and deposited with him notes of other persons, payable to the firm, as collaterals to secure the payment of the same. Afterwards Frisbie was informed that Wallace held these, and made no objection thereto. In the language of the witness, "he neither assented nor dissented."

At the August term, 1876, of the circuit court, Frisbie filed a bill in chancery against Rappleye & Wallace, charging that Rappleye was collecting of the assets of the late firm moneys, and using the same in his own private business, and not applying the same to the payment of firm debts, and charging that Rappleye induced him to make the agreement

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of April 18, 1876, by representing to him that Wallace would, in such case, "at once come to his aid with such pecuniary assistance as would enable him, with said assets, to pay off the debts and wind up the business;" and charging that Rappleye, in bad faith, had turned over to Wallace a large amount of notes belonging to the assets of the firm, as collateral and additional security to Wallace upon an old debt, which was already fully secured by other collaterals sufficient in value to pay the old debt, and that the old debt was without consideration; that Wallace had not assisted Rappleye in paying off the debts, as Rappleye said he would; that the indebtedness of the late firm to Wallace has not increased except by the interest, and that said securities were placed in Wallace's hands to deprive him and the creditors of the late firm of the same, and for the personal benefit of Rappleye, and cheating Frisbie out of the same, and that Rappleye had no authority to make such use of the assets; that the securities so held by Wallace are excessive, and that Rappleye was insolvent, and asking that that agreement be set aside, and the affairs of the firm settled by having a receiver appointed, and that Wallace be required to surrender the collaterals, and praying for a temporary injunction. That suit was afterwards dismissed by the complainant therein.

This suit was instituted in January, 1877, and is a bill in chancery, brought against John Seely Wallace, by Dennison, stating that judgments had been rendered against Rappleye & Frisbie, one in favor of one Sutor, and one in favor of one Eldred, and that upon creditors' bills filed by these judgment creditors, complainant had been appointed by the court receiver of the assets of said judgment debtors, and charging that before and at the time of filing this bill Wallace had in his possession and custody securities belonging to Frisbie & Rappleye, which he claims to hold as collateral security upon certain indebtedness of Frisbie & Rappleye upon certain

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notes; that such pretended indebtedness is merely colorable, and no consideration ever existed for the same, and claiming that complainant is entitled to the custody of such collaterals, and asking an account of the same may be taken, and if it should appear that Wallace has any lien upon the same, that the amount thereof may be ascertained, that complainant may redeem. Wallace answered the bill, setting out the two principal notes above mentioned, and a list of the collaterals deposited with him at the giving of the first note, and also a list of the collaterals deposited with him at the giving of the second note, and stating, at the time of loaning the money for which the last note was given it was a part of the agreement (and the inducement on which he acted) that he should retain "all of said collaterals, and proceeds thereof, until the amount of all his indebtedness, represented by the two principal notes, should be fully paid." To this answer was filed a replication, and the case was heard on the pleadings and proofs.

Pending the suit, all the collaterals remaining in the hands of Wallace, and not collected, were by consent placed in the hands of complainant, as receiver, for collection, without prejudice to the ultimate rights of either party.

The Superior Court, on final hearing, found the equities in favor of complainant, and held that Wallace was not entitled to apply any of the proceeds of the collaterals deposited at the making of the last note upon the indebtedness evidenced by the first note, and held that he should account to complainant for all proceeds of such collaterals in excess of the amount due upon the last note, instead of applying the same towards the payment of the first note. After the death of Wallace the case was taken to the Appellate Court by his legal representatives, and there the decree of the Superior Court was affirmed. To reverse that judgment of the Appellate Court this writ of error is brought.

Brief for the Plaintiffs in Error.

Messrs. SMALL & MOORE, for the plaintiffs in error:

1. Where a promissory note, to which other notes are deposited as collateral security, contains a provision authorizing the payee to sell the collateral notes at his discretion, and apply the proceeds to the payment of the principal note, but is silent as to the disposition to be made of the surplus of such collaterals after the principal note is paid, the application of such surplus, with the maker's consent, to the payment of another indebtedness owing by the maker to the payee, will be upheld against other creditors of the maker, if no fraud is shown. In such a case, if a contest arises as to the application of the surplus of collateral notes, the proceeds thereof, the creditor having the superior equity will prevail, or "where the equities are equal, the first in time is the first in right." Adams' Equity, 148; Bispham's Equity, 50.

2. The equitable title to a promissory note may, and often does, pass by mere delivery. *Garvin v. Wiswell*, 83 Ill. 215.

3. In the absence of a provision in the principal promissory note requiring the surplus of collateral notes to be returned to the maker of the principal note, after it is paid, the law would presume such a duty to be cast upon the payee; but such a presumption may be rebutted by parol evidence of an agreement, contemporaneous with the principal note, that such surplus of collaterals should be applied to the extinguishment of another indebtedness owing by the maker to the payee. All presumptions may be rebutted by parol testimony. *Davenport v. Mason*, 15 Mass. 89; *Barker v. Prentiss*, 6 id. 433; 1 Greenleaf on Evidence, sec. 484 a; 2 Parsons on Contracts, p. 553; 3 id. p. 280; *Jeffrey v. Walton*, 1 Starkie, 267; Story's Eq. Jur. secs. 1202, 1531.

4. A receiver, appointed in supplementary proceedings, to enforce the claims of certain judgment creditors for certain fixed sums against the estate of an insolvent debtor, is limited in his recovery to an amount sufficient to cover such

Brief for the Defendant in Error. Opinion of the Court.

claims, and interest, together with the costs of the proceeding. *Bostwick, Receiver, v. Menck*, 40 N. Y. 383.

The receiver's right of action in such cases is "precisely such as the creditors themselves might have maintained, and no more." *High on Receivers*, sec. 455.

Mr. J. L. HIGH, for the defendant in error:

1. The dissolution of the partnership terminated the power of both partners, and Rappleye had no authority thereafter beyond that specified in the articles of dissolution. By those articles he was made a trustee for all the creditors, without priority, and no power or authority was conferred upon him to secure one creditor to the prejudice of the others. He could not use the firm name in giving new obligations, and had no authority to pledge the firm assets. *Story on Partnership*, sec. 322; 3 *Kent's Commentaries*, 63, and notes; *Hicks v. Russell*, 72 Ill. 230.

2. The existence of a former debt due to Wallace did not authorize him to apply thereon the securities received for the subsequent debt. The mere existence of another debt does not authorize the pledgee to detain the pledge as security for that debt, unless such was the intention of the parties. *Story on Bailments*, sec. 304; 2 *Kent's Commentaries*, 584; *Baldwin v. Bradley*, 69 Ill. 32; *Jarvis v. Rogers*, 15 Mass. 389.

Mr. CHIEF JUSTICE DICKEY delivered the opinion of the Court:*

Two questions are presented for decision in this case: First, the question of fact, whether the collaterals deposited at the making of the note of April 20, 1876, were pledged as collaterals in Wallace's hands to secure not only that note, but also to secure the payment of the preëxisting debt

*At the time this opinion was delivered Mr. Justice DICKEY was Chief Justice.

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upon the note of December 28, 1875; and second, whether Rappleye had lawful authority to make such pledge, if it were in fact made.

After a most careful consideration of the evidence on the subject, we are brought to the conclusion that the pledge was in fact made to secure both of these notes. Wallace and Rappleye both swear positively that this is the truth, and no witness contradicts them in this respect. Not only so, but there is such inherent evidence of the truth of this testimony arising out of the circumstances of the case, as to give great strength to it. Rappleye and his partner were not in harmony. The affairs of the firm had just been turned over to Rappleye for management. The money of the insurance company had been wrongfully applied to the payment of a debt of the firm, in the expectation that the demand of the insurance company could be met by money expected from another source. Rappleye, in his solicitude to get rid of a partner not in harmony with him, had (as Frisbie claims) represented to him that if he alone had the management, Wallace (his father-in-law) would furnish the ready money necessary to carry the debts of the firm until their resources could be made available. He may have hoped that this would be so. When applied to for a further loan, however, Wallace was found to be very cautious, and probably somewhat suspicious as to the discretion and capacity for success of his son-in-law. He was not disposed to lend any more money in that direction, but was at length induced to do so by the consideration that the collaterals offered were more than sufficient for the present loan, and he would thereby strengthen his security upon his first note. The conversations and discussions on this subject, sworn to in detail by both Wallace and by Rappleye, are so natural and probable, and so fully in harmony with the ordinary course of affairs with men of like relative conditions under similar cir-

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cumstances, as to render it very improbable that they could have been invented in all their details.

It seems to be supposed by counsel for the receiver that certain circumstantial evidence in the case rebuts the conclusion that Rappleye had agreed with Wallace that he might retain these notes as collateral to the old debt as well as to the new, and for this purpose the fact is supposed to be established that in the chancery suit of Frisbie, both Wallace and Rappleye made oath that these collaterals were held by Wallace for the new debt only, and for no other debt, and that in a prosecution against Frisbie, instituted afterwards, Rappleye so testified. It may be conceded that Rappleye did so swear, but he now swears that his former statements were not correct on this question. This identical question now presented was not a material question in issue in either of those cases. The substantial allegations on which the chancery suit was based were, that the assignment of these collaterals was made *without* consideration, and that the first debt was fictitious and fraudulent, and not real, and if real, was already well secured, and hence the pledge for the old debt was unwarranted. The material allegation of the answer in that case was, that the pledge was made to secure the new debt, of which Frisbie had made no mention. The material question was not whether the pledge extended over the old debt, but was whether it rested upon a real, valid, subsisting debt. It was material to show the new debt, and the pledge therefor. This being shown, it was not material in that case whether the pledge covered the old debt or not. Rappleye's affidavit and his testimony, therefore, were not as to matter material to the issues in the proceedings in question. These circumstances, therefore, are not sufficient to authorize the rejection entirely of the testimony of Rappleye in this case. Contradictory statements by a witness as to immaterial matters do tend to cast suspicion upon the testimony of a witness, but do not authorize its entire rejection, where he is corroborated

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by another witness, and not contradicted by any evidence in the case.

As to the claim that Wallace made any statement in his affidavit at variance with his present testimony, it is not sustained. The only evidence on this question is that of Mr. Cooper, who drew the affidavit of Wallace, referred to. He says as to Wallace's affidavit, that it was *about* the same as that of Rappleye. This was the recollection of Mr. Cooper as to the contents of an affidavit drawn by him in another suit, near three years before he gave his testimony. An examination of Rappleye's affidavit, referred to by the witness, shows that it contains nothing directly on the question as to whether Wallace had an agreement from Rappleye to hold these securities as collateral to the first note. There is one expression which contains that idea by implication. There is nothing in this record indicating that Mr. Wallace was not a man of unquestioned standing in the community as a man of wealth, caution and integrity. He was not interrogated at all as to this affidavit. We are satisfied his testimony in this case is true.

The next question relates to the power of Rappleye to pledge these collaterals to secure the first debt. Counsel for the receiver seems to construe the contract of April 18, 1876, between Frisbie and Rappleye, as an assignment of the assets of the firm for the *benefit of creditors*, and hence insists that Rappleye became "a trustee for all the *creditors*, without priority," and that he therefore had no power or authority to secure one creditor to the prejudice of others. In the absence of this agreement between these partners, it will not be denied that Frisbie and Rappleye, in winding up their affairs, could have made a valid contract with Wallace that if he would make the second loan he might hold the securities as collateral to both debts, or to his entire claim. This contract differs from an ordinary assignment for the benefit of *creditors* in its whole character and structure. It was made for

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the benefit of *the parties* to it, and Rappleye was given the largest powers and discretion. The end to be accomplished for the benefit of the parties was, that the debts and liabilities should be extinguished out of the assets, without sacrifice of the assets, and a surplus divided. To "secure that end" Rappleye was authorized "to trade any part of the assets, and to do all and every the matters and things that may be * * * expedient in settling the affairs of the firm." It was plainly the design and effect of this contract to clothe Rappleye with powers to this end equal to the combined power of both Frisbie and Rappleye,—that he was to be in that regard in full the representative of the late firm. Frisbie plainly understood that Rappleye had power in some way to borrow money, for in his bill he said he was expected to get advances from Wallace, and his complaint was that this was not done; and he also understood that Rappleye had power to pledge assets to secure old debts, even without any new consideration. He was told by Wallace that he held this second parcel of securities. At that time he did not know of the new loan by Wallace, and yet he made no objection and did not then find any fault with the arrangement.

In an ordinary assignment to a trustee for the benefit of creditors, the title to the assets is passed from the debtors, so that the same can not be reached by creditors except by virtue of their rights under the assignment. Here the title was placed in Rappleye, and in his hands these assets were as open to appropriation by creditors as if the assignment had not been made. Their rights were in no way affected by the transfer. The object and legal effect of this contract was that the prosecution of the business should cease, and that Rappleye should have vested in him all the powers which both the partners would otherwise have had in the management of the property, to the end that they should both be relieved from liability as debtors. This case does not involve the question of the personal liability of Frisbie

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upon the last note. The validity of the debt for which that note was given, and of the note as the note of Rappleye, may be, and no doubt is, involved. Rappleye had authority to apply the assets to pay the debt of the insurance company, or to pledge assets in its security to procure extension of time for the payment thereof; or, under the powers given in the agreement, he had power to borrow money to pay that debt, upon his own note, and pledge the assets in security, if the pledgee was given no power to sell the assets in violation of the limitations in the agreement. Treating, then, this new note merely as the note of Rappleye alone, it is a debt of such character that the pledge of collaterals was in that regard valid.

The remaining question relates to Wallace's right to a lien on the collaterals for the payment of the first note. Obviously Frisbie understood that he had by this contract clothed Rappleye with power to pledge assets to secure the payment of old debts. He was told by Wallace that he held this second parcel of securities. At that time he did not know of the new loan, and yet he made no objection thereto. Afterwards, when he got the notion that this first indebtedness was not real, he filed his bill charging that there was no foundation for this old indebtedness, that it was merely colorable, and that Rappleye had no lawful authority to pledge the collaterals to secure a fictitious claim of indebtedness.

We are fully convinced that the pledge was made as claimed by Wallace, and that in equity Wallace's estate should be fully paid from the proceeds of the collaterals in question, before the application thereof to any other debts of the late firm.

The judgment of the Appellate Court is therefore reversed, and the decree of the Superior Court of Cook County is also reversed, and the cause remanded to the Appellate Court, to be remanded thence to the Superior Court, with directions to enter there a decree in conformity to the views herein expressed.

Judgment reversed.

Mr. Justice MULKEY, dissenting.

MR. JUSTICE WALKER: I concur in the conclusion reached, but not in all that is said in the opinion.

MR. JUSTICE MULKEY, dissenting:

Ordinarily, when I am unable to agree with the majority of the court in the decision of a case, I am content to simply place myself upon the record as dissenting, and sometimes I do not even do that. But inasmuch as the conclusion reached in the present case seems to me to be not only destitute of any authority even tending to support it, but in direct conflict with well recognized principles founded upon an unbroken current of authority, I feel it due to myself, as a member of the court, to do something more than merely mark myself as dissenting.

With respect to the collaterals given with the note of the 28th of December, there is no ground for controversy. It is conceded that the note was given for money loaned by Wallace to Frisbie & Rappleye, in the usual course of business, and the makers had a perfect right to secure it in the manner they did. Indeed no question is made upon the argument with respect to Wallace's right to the collaterals given with this note. The whole controversy is confined to the right to give the subsequent note, and the disposition sought to be made of the collaterals accompanying it. This note, it will be remembered, was executed by Rappleye in the name of the firm, two days after the dissolution of the partnership between Frisbie and Rappleye, Wallace at the time having notice of such dissolution. It is conceded the note was given for loaned money, which was used by Rappleye in the payment of a partnership debt, yet defendant in error questions the power of Rappleye to execute it so as to bind the firm or the partnership effects. While the authorities are not altogether harmonious as to the power of partners after dissolution to bind one another by new engagements, yet the general doctrine, as shown by the decided weight of

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authority, unquestionably is, that notwithstanding the dissolution the partnership still exists, *sub modo*, for the purpose of collecting and paying the debts of the firm, and of doing such other acts in the regular course of business as are necessary to winding it up. The power of disposing of the partnership effects for these purposes exists practically to the same extent as it did before dissolution. Whatever is essential to the winding up of the business of the firm, as contradistinguished from what might be deemed politic, desirable or expedient, may be done, and nothing more. Parsons on Partnership, (2d ed.) 388, side page; *Hicks v. Russell*, 72 Ill. 230. As contracts of sale are essential to the disposition of the partnership property, whereby the necessary means may be raised for the payment of debts, they may be made as well after as before dissolution; and this power to sell, as a general rule, includes the power to mortgage or pledge the partnership property, yet this power may, and often is, modified or limited by agreement of the parties. Herman on Chattel Mortgages, sec. 118; 5 Wait's Actions and Defences, 127.

In the application of the general rule that each partner, after dissolution, has the right, where the same has not been relinquished by special agreement, to enter into such contracts and engagements as are necessary to the closing up of the partnership business, it is generally held that a partner, after dissolution, has no implied power to give a note or other negotiable security in the firm name, even for a pre-existing debt, and such is the doctrine of this court. Parsons on Partnership, 391; *Hicks v. Russell*, 72 Ill. 230.

If such be the rule with respect to antecedent indebtedness, it must be conceded that it applies with greater force to an indebtedness created after such dissolution. It is believed that no decision of any respectable court can be found holding that a partner, after dissolution, can, by virtue of any implied authority arising out of his relation to the dissolved

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partnership or the partnership effects, go into the market, borrow money, and execute in the partnership name a note or other negotiable security therefor, so as to bind the other partners or the partnership effects, where the party advancing the money and taking the note or other security has notice of the dissolution of the partnership. Whether in such case, where the money thus procured has been applied in the discharge of a preëxisting firm debt, the party lending it will in equity be subrogated to the rights of the creditor, as against the firm whose debt has been liquidated by the loan, is a question which does not arise upon this record, and about which it would be useless to express an opinion.

It follows, from what I have already said, that Rappleye had no authority either to borrow the money advanced by Wallace on the 20th of April, or to execute the note given therefor, and if the partnership was not bound thereby, it is difficult to see on what principle Wallace could hold the collaterals. The note in question, then, was in law simply the individual note of Rappleye, and Wallace, having actual notice of the dissolution of the partnership, is conclusively presumed to have known that Rappleye, after such dissolution, had no implied power, by reason of existing relations to Frisbie, to execute a note or borrow money so as to bind the latter, and that under the circumstances Rappleye alone was bound. This being so, Wallace was not warranted in relying upon the firm for payment, except so far as he might be subrogated to the rights of the insurance company, whose debt against the firm was liquidated with the money advanced by him to Rappleye; nor was he authorized to receive in pledge the securities or collaterals given to him by Rappleye with that note. It was a misappropriation of the partnership effects, in which Wallace personally participated, with express notice of such facts as in law showed the transaction unwarranted.

There is another view of this case, however, equally unfavorable to plaintiffs in error. At the time of the dissolution

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the partnership was insolvent, and Frisbie had an unquestioned right to provide for an equal division of the assets of the concern among the creditors, according to their respective demands. As a partner he had a lien in equity upon these assets, as well for his own indemnity against personal liability for the debts of the firm, as for his proportion of any surplus that might be coming to him after payment of the debts. Having these rights, by the articles of dissolution he "*transferred*" and "*assigned*" to Rappleye, "*as trustee,*" his entire interest in the partnership effects "*in trust,*" to "collect the assets of the firm, and from the proceeds thereof pay the firm debts in full," provided the assets were sufficient for such purpose. It will be observed that this instrument contains apt and appropriate words of conveyance and transfer, and by it Rappleye clearly acquired the exclusive legal title to all the partnership property, subject to the trusts upon which the transfer was made. Upon the execution and delivery of this instrument an express trust was thereby created, not only in favor of Frisbie himself, but also in favor of all the creditors of the firm. By virtue of it each creditor became entitled to share in the proceeds of the partnership estate in proportion to the amount due him, and it was not in the power of the trustee to hypothecate to one having notice of the trust, a portion of the assets, to secure the claim of one creditor so as to give him a preference over the others. Wallace himself states that he knew of the dissolution at the time of the giving of the last note and the transfer of the collaterals accompanying it, and the evidence satisfactorily shows that he was made acquainted with the terms of the dissolution. Indeed, there is no claim on the part of either Rappleye or Wallace that the latter did not fully understand the terms upon which the partnership was dissolved, and by which Rappleye was given exclusive control of its affairs for the benefit of the creditors, as already shown. Assuming, then, that these collaterals were given, as is claimed by Wal-

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lace and Rappleye, to secure the first as well as the last note, it is manifest that in so far as they were given to secure the first note, it was in effect giving Wallace a preference over other creditors, which was a violation of the trust, in which Wallace personally participated, and from which he is not permitted to derive any advantage. There is nothing in the instrument to warrant the attempted preference. By its terms all the creditors are put upon terms of perfect equality, and it was the duty of the trustee to so execute the trust as to effectuate the clearly expressed intention of the parties in that respect. The partnership effects having been conveyed in trust to Rappleye in the manner and for the purposes we have seen, it was not necessary for a creditor of the firm to first go into a court of law to establish his claim, and could not by doing so thereby obtain an advantage over other creditors who did not see proper to take that course. The assignment in question brings the case directly within one of the exceptions to the general rule that a party must first exhaust his remedy at law before going into a court of equity. 2 Perry on Trusts, sec. 594; *Steere et al. v. Hoagland et al.* 39 Ill. 264; Hill on Trustees, 518, side page.

The members of a partnership, either before or after dissolution, may, where no statutory provisions intervene, like other persons who sustain no such relation to each other, make a partial or total assignment of the partnership effects in such manner as to give a preference to one or more of their creditors. This right of partners to prefer creditors in disposing of their property, rests upon the ground that their ownership and power of disposition are as unlimited and absolute as that of persons sustaining no such relation to each other. (2 Leading Cases in Equity, 395, and authorities there cited; *Reeves v. Ayers*, 38 Ill. 418.) It has been supposed that the creditors of a partnership, particularly after dissolution, have something in the nature of an equitable lien upon the partnership effects; but such is not the case.

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(2 Leading Cases in Equity, 396.) But where the partnership has been dissolved by the death of one of the partners, the survivor will in equity be regarded as a trustee of the partnership property, for the benefit of the partnership creditors as well as the legal representatives of the deceased partner, and in such case the former have an equity, arising out of the lien of the partners upon the partnership effects, as above mentioned, by which they are entitled to payment of their claims before any part of the partnership assets can be applied to the payment of the individual creditors of the partners. And in such cases the assets being insufficient to pay the full amount of the claims of the partnership creditors, they are to be paid *pro rata*. *Reeves et al. v. Ayers, supra*; 2 Leading Cases in Equity, 396; Parsons on Partnership, 441, *et seq.*; *Hapgood v. Cornwell*, 48 Ill. 64; *Ladd v. Griswold et al.* 4 Gilm. 25.

The Superior Court, in disposing of this case, doubtless proceeded upon the theory that Rappleye had authority to make the loan and hypothecate the collaterals for the payment of both notes, but found, as a matter of fact, they were pledged for the payment of the last note only, and admitting the law to be as is assumed upon that theory, the decree was clearly right. Upon that theory, the whole case turned upon a pure question of fact, which the court found adversely to plaintiffs in error, and upon a careful consideration of the evidence it is difficult for me to conceive how they could have reached any other conclusion. It is true that in this suit, near three years after the alleged hypothecation, Wallace and Rappleye both swear positively that the collaterals in question were given to secure both notes; but it is equally true that they both swore just as positively, in another proceeding only a few months after the transaction occurred, when the circumstances must have been fresh in their minds, that they were given to secure the second note only. Besides, Mr. Young, who was present when it is claimed that there

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was a verbal understanding between them that the collaterals were to apply to both notes, swears that he heard nothing of the kind pass between them, and that it was not till months afterwards he heard Rappleye say there was some kind of an understanding to that effect, but that he, Rappleye, could not tell whether it was in writing, or otherwise give any distinct or satisfactory account concerning it. Moreover, the instrument of hypothecation which was executed at the time, shows upon its face that these collaterals apply exclusively to the last note, and that no reference whatever is made to the first note. In view of these facts I am at a loss to see how the Superior Court could have come to any other conclusion than that which it did, upon that question.

But the consideration which, in my judgment, is absolutely conclusive of this case, is the fact, already shown, that upon the dissolution of the partnership Frisbie conveyed the entire partnership effects to Rappleye in trust, for the benefit of the partnership creditors, and under such assignment Rappleye had no power to so dispose of the assets of the firm as to give one creditor a preference over another, especially when such preferred creditor had notice of the assignment, as is shown to have been the case here. It is true, the mere retirement of one partner upon the dissolution of the firm, with the understanding that the other partner shall collect and pay all debts, and have the exclusive control and management of the partnership effects in winding up the business of the partnership, will not have that effect, for the reason such an agreement as that does not transfer the legal title in the partnership effects from one partner to the other, and hence no express trust is thereby created. But in the present case the legal title of Frisbie to the partnership effects passed to Rappleye, and the latter became thereby converted into a trustee, like any other assignee, for the benefit of creditors. That such is the legal effect of the assignment to Rappleye, is fully sustained by a number of well-considered cases, and

Syllabus.

no authority has been produced, nor is it claimed that any such exists, even tending to sustain a contrary view. *Sedam et al. v. Williams et al.* 4 McLean, (Mich.) 51; *Wilds et al. v. Chapman et al.* 4 Edw. Ch. 669.

It follows, therefore, that Rappleye had no power to hypothecate the collaterals in question to secure the first of said notes. To do so was a fraud upon the other creditors of the firm, in which Wallace knowingly participated. If any error at all was committed by the Superior Court, it was in favor of plaintiffs in error, and they therefore have no right to complain of it.

For the reasons stated, I am clearly of opinion the judgment of the Appellate Court should be affirmed.

CRAIG and SCHOLFIELD, JJ.: We dissent from the opinion of the court, and concur in the foregoing opinion of Mr. JUSTICE MULKEY.

CAROLINE A. JACKSON

v.

GEORGE A. MINER *et al.*

101	550
126	530
101	550
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Filed at Ottawa, September 26, 1881—Rehearing denied March Term, 1882.

1. **FRAUDULENT CONVEYANCE**—*gifts not valid as to then existing creditors.* The purchase of property by a man, for a woman, in his own name, and its conveyance to her without any pecuniary consideration, and in view of illicit intercourse with her, past and expected, will not be sustained as against the claims of creditors for debts owing at the time of the grant, which he at that time was unable to pay.

2. **SAME**—*as to subsequent creditors.* Where property was bought for another as a gift, and the person to whom the gift was made put in possession of the same in 1870, and the conveyance made to her and recorded in December, 1871, at which times the party making the purchase and gift was solvent and in good credit, it was *held*, that the gift could not be set aside by creditors for debts accruing to them in 1873 and 1874.

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3. *COMPROMISE—setting aside for fraud.* A compromise by a debtor with his creditors, by which he paid fifty cents on the dollar of his indebtedness, and procured releases, will not be set aside, in the absence of proof of any false representations or fraud except his omission to inform his creditors that he had held the title to certain houses and lots, and had made a gift of them to another.

4. *ALLEGATIONS AND DECREE—must correspond.* On a creditor's bill to set aside certain voluntary conveyances as having been made to hinder and defraud creditors, a prior compromise of the debtor with the creditor, by which fifty per cent of his indebtedness was taken in full discharge, can not be set aside, and the settlement opened for fraud, where no such case is made in the pleadings, or shown by the proof.

5. *ACKNOWLEDGMENTS OF DEEDS—impeaching the certificate.* The testimony of a widow that she never joined with her husband in the execution of a deed, or acknowledged the same, is not sufficient to overcome the certificate of the officer as to her acknowledgment, and his testimony in support thereof.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

This is a proceeding in chancery, instituted by Miner and others, constituting a mercantile firm of Boston, as creditors of Eli D. Terry, deceased, to set aside certain deeds made by Terry and his wife, during his life, to Caroline A. Jackson, the appellant.

The first deed called in question is a conveyance of a lot and dwelling house known as 1393 Indiana avenue, in Chicago, alleged to have been made about December 21, 1871. The second is a conveyance of a house and lot in Chicago known as 134 Paulina street. The ground of attack is the allegation that these conveyances were made with intent to cheat and defraud complainants and other creditors of Terry. The property on Indiana avenue is alleged to be of the value of \$8000, and that on Paulina street to be worth about \$6000. It is charged that each of these deeds was made without any pecuniary, legal, or equitable consideration, and for the purpose of defrauding creditors. It is also charged that in the making and acknowledging of the deed for the

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property on Indiana avenue, the wife of Terry was personated by some other woman, and really never joined in the same, or released her dower.

Caroline A. Jackson, answering, denies the fraud alleged in the bill, and denies most of its allegations, and vindicates the deeds in question, saying they were made "as so much paid to her towards an actual indebtedness to her by Terry." By leave of court she amended her answer, and set up that in November, 1870, she procured Terry, as her agent, to purchase for her the property on Indiana avenue, and that the same was then so bought by her with her own money, through him as her agent, and that he, without her knowledge, took the title in his own name, and that the title was afterwards conveyed to her merely because it was her property in equity; that his title was merely that of trustee, the purchase money being furnished by her.

By consent, the widow of Terry, Mrs. Caroline Terry, was made a party defendant, and she answered the bill, and filed a cross-bill against complainants and Caroline Jackson, stating the facts substantially as stated by complainants in the original bill, and charging that she never joined in the deed for the Indiana avenue property, and she claims dower in both properties. Issues were formed and proofs taken.

The circuit court, on final hearing, granted the relief sought in the original bill, finding that the deeds in question were made with intent to delay and defraud creditors, and setting the same aside as void against creditors, and also sustained the claim of Mrs. Terry for dower in both pieces of property,—in one, upon the ground that her release of dower was obtained by fraud, and in the other, upon the ground that she never joined in the deed or made the acknowledgment thereon indorsed. From each of these decrees Caroline A. Jackson appeals.

Brief for the Appellant.

Messrs. ELDRIDGE & TOURTELLOTTE, for the appellant, after stating and discussing the facts, made the following among other points of law as applicable to the case:

The appellees, to maintain their bill, must show that they were existing creditors at the time of the conveyances, or they must show that the conveyances were actually made with the intent and purpose of defrauding subsequent creditors, and that the grantor was insolvent at the time. *Hudnal v. Wilder*, 4 McCord, 294; *Cole v. Tarier*, 31 Ala. 244; *Converse v. Hartley*, 31 Conn. 372; *Ward v. Hollins*, 14 Md. 158; *Thacher v. Phinney*, 7 Allen, (Mass.) 146; *Lynch v. Raleigh*, 3 Ind. 273; *Horn v. Volcano & Co.* 13 Cal. 62; *Lyman v. Cessford*, 15 Iowa, 229; 1 Grant Cases, 74; 11 Mo. 540; 88 Ill. 385; *Mixell v. Lutz*, 34 id. 386; *Moritz v. Hoffman*, 35 id. 553; *Gridley v. Watson*, 23 id. 186; *Woodrich v. Page*, 68 id. 157; *Griffin v. First National Bank*, 74 id. 259.

The mere fact of an indebtedness existing does not render a voluntary conveyance void, if there was no intent to defraud creditors. *Moritz v. Hoffman*, 35 Ill. 553.

It must be averred and proved that the grantor, at the time of the conveyance, was insolvent. *Patrick v. Patrick*, 77 Ill. 555.

In the case of a voluntary conveyance by an insolvent debtor, if the debtor pay the claim, the conveyance can not be set aside by the creditor for a debt subsequently contracted. *Hudnel v. Wilder*, 4 McCord, 294.

Even a conveyance without consideration, made to defraud creditors of the grantor, is valid against subsequent creditors, with notice of the first conveyance, and recording a deed is such notice. *Stivers v. Morse*, 47 N. H. 532; *McNeely v. Rucker*, 6 Blackf. 391; *Fowler v. Stoneum*, 11 Texas, 478.

As to the force of denial of signature, as against the acknowledgment before a notary, we refer to *Myers v. Parks*, 95 Ill. 410.

Briefs for the Appellees.

Messrs. BOUTELL and WATERMAN, for the appellees Miner, Beal & Hackett:

Although a deed for past cohabitation is good as between the parties, it is void as against creditors, being simply a voluntary gift. Even seduction is no consideration. 1 Parsons on Contracts, (5th ed.) 435; *Binnington v. Wallis*, 4 B. & Ald. 650; *Beaumont v. Reeve*, 8 Q. B. 483; *Wait v. Day*, 4 Denio, 443; *Sherman v. Barrett*, 1 McMullan, (S. C.) 162; *Hargrooves v. Meray*, 2 Hill's Ch. (S. C.) 222.

"If the donor is insolvent at the time of the transfer, the conveyance is generally deemed to be void as to subsequent creditors." Bump on Fraud. Con. (2d ed.) 314, 315.

The plaintiffs stood in the position of continuing creditors, and such creditors are not included in the rules which apply to merely subsequent creditors. Bump on Fraud. Con. 314, 315, (2d ed.); May on Fraud. Con. 52, 63, 64; Hunt on Fraud. Con. 50; *Holmes v. Pinney*, 3 Kay & Johns. Ch. 99; *Parish v. Murphree*, 13 How. 99; *Townsend v. Windham*, 2 Ves. Sr. 1; *Bay v. Cook*, 31 Ill. 343; *Case v. Phelps*, 39 N. Y. 164; 1 Am. Lead. Cases, 42; Story's Eq. Jur. secs. 361, 362; 1 Smith's Lead. Cases, 46, 47; Rev. Stat. 540, chap. 59, sec. 4.

Messrs. GAULT & Low, for the appellee Caroline Terry:

The question of law is this: Is a married woman's dower barred in the property conveyed by a deed in which she joined, when that deed is afterward attacked and set aside as having been designed to hinder, delay and defraud the creditors of the grantor? Upon this proposition the law is very clear, having been passed upon and decided in the negative by our Supreme Court on many different occasions. *Blain v. Harrison*, 11 Ill. 384; *Summers v. Ball*, 13 id. 483; *Stribling v. Ross*, 16 id. 122; *Gove v. Cather*, 23 id. 634; *Morton et al. v. Noble et al.* 57 id. 176.

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Mr. JUSTICE DICKEY delivered the opinion of the Court:

Eli D. Terry, on the first of January, 1870, was a married man, living at Park Ridge, a village of some 400 to 600 inhabitants, located some ten or twelve miles north-west from Chicago, and was the proprietor of one of the largest clothing stores in the city of Chicago, keeping on hand usually a stock of goods of the value of about \$50,000, and apparently doing a very successful business. His wife was an invalid; and though they had lived there nearly a year, his wife was, during that time, confined to the house, and so continued until some time in the spring of 1870. In March, 1871, he removed to Chicago, and took up his residence at 401 Monroe street, and there lived until his death, which occurred February 5, 1875. About the first of January, 1870, Caroline A. Jackson, then about 24 years of age, who had been supporting herself for about eight years, and managing her own affairs, engaged in teaching, book-keeping, etc., came to Park Ridge from Indiana, for the purpose of teaching for two months a school at that place, instead of her cousin, who had taught up to that time. She taught there until the first of March of that year, and then went to her friends in Ohio; returned to Chicago early in May of that year; boarded at a boarding house on the North Side until June of that year; then went to housekeeping in a house on Lincoln street; remained there until November of that year, and at that time moved to a house on Indiana avenue, and lived there until the fall of 1872, when she removed to a house on Paulina street, and was living in that house at the time of the commencement of this suit. The controversy in this suit relates to the properties mentioned as on Indiana avenue and on Paulina street.

The property on Indiana avenue, so far as the title papers show, was bought by Eli D. Terry, in November, 1870, through a contract of purchase, made about the time Caro-

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line Jackson began to occupy the same. The deed was made to Terry in pursuance to this contract, about January 1, 1871, and in December, 1871, Terry and wife conveyed this property to Church, and Church conveyed the same to Caroline A. Jackson. The property on Paulina street was conveyed to Terry, by Henry Waller, by deed dated September 1, 1872, and was conveyed to Caroline A. Jackson by Terry (his wife not joining), by deed dated December 3, 1874, and acknowledged and delivered about January 23, 1875, being less than two weeks before the death of Terry. These deeds were all recorded soon after their delivery.

It is shown that no money or other value was paid at the time of the deed by Terry to Church, or at the time of the deed from Church to Caroline A. Jackson; and although a note of over \$8000, from Terry to Miss Jackson, was surrendered by her on the receipt of the deed for the property on Paulina street, she testifies the surrender of this note was a sham to conceal the real character of the transaction, and that this note formed no part of the consideration for that deed. This proof, standing alone, indicates that the deeds through which Caroline A. Jackson derived title to both of the properties in question, were merely voluntary, and without any valuable consideration. And while such deeds were valid as against Terry and his heirs, yet they may be avoided by then existing creditors, if he were then unable to pay his debts.

The substance of the story presented by the testimony of Miss Jackson is, that equitably neither of these properties ever was the property of Terry; that while for certain reasons the contracts of purchase and conveyances were taken in Terry's name, yet in fact the purchases were made by him for her, and were paid for with her own money, given to Terry for that purpose. She concedes that she received all this money (and considerably more, which she applied otherwise,) from Terry, and says it was so paid to her in part

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satisfaction of a preëxisting indebtedness of Terry to her. When pressed for the source of this indebtedness, she says, in substance, that on about the 12th of February, 1870, she became engaged to be married to Terry, and that by their agreement they were to be married about the 1st of May of that year; that at that time, and upon one or more occasions between that time and the first of May, she and Terry had sexual intercourse with each other; and that during all that time she had no knowledge, thought or suspicion that Terry was a married man; and that when the time appointed for their marriage arrived, Terry failed and refused to marry her; and in consideration of her claim upon him for this breach of promise and deception, and also of past sexual intercourse, Terry agreed to pay her \$30,000, and she agreed to accept the same in satisfaction of her wrongs; and that in part performance of that agreement he did pay to her, from time to time, large sums of money, in all as much as \$16,000 to \$18,000; and that the money with which each of these properties was bought was a part of these moneys thus received by her from Terry.

All this *may* be true; but in view of certain well established facts in the case, the story, in some essential respects, seems so extremely improbable that we can not adopt it as the truth. We can not believe that on February 12, 1870, Caroline A. Jackson was not aware of the fact that Terry was a married man. She was introduced to him very soon after her arrival at Park Ridge, and by her story he seems to have been very much interested in her from their first meeting. They met first at a church sociable in Park Ridge, and she says they had then and there a conversation of at least an hour, in which he requested that she should correspond with him. A few days after, he attended public exercises in her school, and there renewed his request, and she assented to it and took his address in Chicago, and they exchanged letters from that time until February 12 (some five weeks), and in

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the meantime she met him several times at church sociables, and upon two occasions he called on her at her boarding house, and this, without the knowledge of the lady with whom she boarded. She called in the meantime once or twice at his store in Chicago, being deeply veiled when she made these calls, and talking with no one else at the store; and at one of these visits she dined with him at one of the principal hotels in Chicago. She meanwhile attended frequent religious meetings and church sociables, and at the religious meetings sung in the choir. Terry appeared at some of these sociables, and when he did the ladies very generally inquired of him in relation to the health of his invalid wife. He usually spoke freely on that subject, and one witness speaks of one conversation, in which Miss Jackson took part, in which he spoke distinctly of his wife in her hearing and presence. His residence was one of the prominent buildings in the village, with spacious grounds and ornate shrubbery, and stood only a few blocks from the boarding house of Miss Jackson, and in plain view from the door of that house. He was regarded as one of the principal citizens, and was usually at home each night, going to his store in Chicago in the morning on the railroad train, and returning in the evening. It seems highly improbable that Miss Jackson, mingling with the pupils of the only school of the place, and with the ladies at most of the church sociables, and sitting in the choir at most of the religious meetings during these five or six weeks, in a village of not exceeding 600 inhabitants, could remain in such utter ignorance as to the *status* of a man who was making love to her so vigorously. The secrecy of his visits at her boarding house, of their correspondence, and especially of her visits to his store in Chicago, with the readiness with which she consented to visit his private rooms in Chicago on the day of the alleged marriage contract, all indicate that she was aware that it was illicit love that prompted his actions, and that she tolerated his

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attentions when she was aware of the fact that he was a married man.

From all the circumstances, we are forced to believe that the marriage contract is a fiction; that the money lavished on this woman was merely in view of illicit intercourse, past and expected; that the house on Lincoln avenue was bought with that view, and used for that purpose, and so with the house on Indiana avenue, and also the house on Paulina street. That Terry was enamored of Carolina A. Jackson we do not doubt, nor do we doubt that this attachment continued until his death; but we are persuaded that the purchase of these houses for her in his name, and their conveyance, were mere gifts or grants, without such consideration as should shield them from the claims of creditors as to debts owing at the time of the grants, which he at that time was unable to pay.

As to the property on Paulina street, the grant was made when Terry must have known that he was insolvent, and the debts due to the complainants, which now remain unpaid, were then in existence. As against the complainants, to the extent of the unsatisfied part of their claims, the deed to Miss Jackson for the Paulina street property can not properly be allowed to stand. The decree of the circuit court in that regard is therefore affirmed.

Regarding the conveyance of the property on Indiana avenue as also a mere voluntary conveyance, it remains to inquire whether the complainant creditors of Terry are in a condition to enable them to call it in question. It is conceded that the debts now due to them accrued in 1873 and 1874. The property was bought for her and put in her possession in 1870, and the conveyance was made in December, 1871, and was on record. At that time he seems to have been solvent, and in good credit. It is said, however, that at that time Terry did owe these complaining creditors a considerable amount, and that early in 1872 Terry compromised

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with his creditors at fifty cents on the dollar, and procured releases, and that although he afterward paid the fifty per cent agreed upon in the compromise, still the other half of the debt has never been paid, and in justice the estate ought to be held for that, because these creditors were ignorant of this conveyance to Miss Jackson, and would not have accepted the compromise if they had been aware of the true state of the case. To sustain this position, a case should be made upon the pleadings, and sustained by proof, which would authorize the setting aside of that compromise of 1872. No such case is made. The compromise was made chiefly on account of his losses by the fire of 1871. There is no proof of any false representations or other fraud on the part of Terry in making this compromise. The mere fact that he omitted to mention that he had held title to this property, and had made a gift of it to another, is not a sufficient basis for such a decree.

It is suggested that the fifty per cent embraced in that compromise which was paid, was not really paid, but was simply changed into another form through new credits,—in other words, that it was paid by goods afterwards sold on credit by the creditor to the debtor, and this debt was simply turned over and changed, by successive credits, in such way that the present indebtedness merely represents the fifty per cent agreed in the compromise of 1872 to be paid for the releases. The proof fails to show such a case. The supposed connection between the present debt and that of 1872, is not shown satisfactorily by the proofs.

As to the claim of Mrs. Terry for dower in this property, we think it ought not to be sustained. She denies that she ever joined in the deed of this property to Church, or released her dower therein. In this we think she is mistaken. The testimony of Barker, the notary, and the evidence of the certificate of the notary, show satisfactorily that she did execute the deed and make the acknowledgment.

Syllabus. Brief for the Appellants.

The decree of the circuit court is therefore reversed, and the cause remanded for other and further proceedings in accord with the views here expressed.

Decree reversed.

WILLIAM TRUESDALE *et al.*

v.

THE PEORIA GRAPE SUGAR COMPANY.

Filed at Ottawa September 26, 1881—Rehearing denied March Term, 1882.

1. **REMEDY**—*laying railroad track in street, by consent of city.* A court of equity will not take jurisdiction to restrain the laying of a railroad side-track by a company in the public street in front of its own property, to connect with the main track of a railway, under license by the city council, by ordinance, on a bill by private individuals owning property in the vicinity, but not abutting on the part of the street to be used.

2. Any damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the license of the city holding the fee of the street, must be sought in an action at law.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. D. McCULLOCH, Judge, presiding.

Mr. JULIUS S. STARR, and Messrs. COOPER & TENNERY, for the appellants:

While it is true that a city holds the fee of the streets, it is in trust for the benefit of the public, and the city authorities have no rightful power to alienate them or divert them to other uses. *Carter v. City of Chicago*, 57 Ill. 287; *Stack v. City of East St. Louis*, 85 id. 379; *Kreigh et al. v. City of Chicago*, 86 id. 407; *City of Alton v. Transportation Co.* 12 id. 60; *City of Quincy v. Jones*, 76 id. 23; *City of Chicago v. Rumsey*, 87 id. 35.

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66a	378
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166	520
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171	514
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194	541
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202	1870
101	561
e208	1869
208	1871

Brief for the Appellee.

The cases sustaining the grant of the privilege to construct a railroad track in a public street, are placed upon the ground that railways are improved highways, and subserve the public good as such, which reason fails here. *G. B. and W. R. R. Co. v. Hartley*, 67 Ill. 443; *Stack v. City of East St. Louis*, 85 id. 378.

The public are entitled to the use and enjoyment of the whole highway, and no individual can appropriate a portion of it to his own exclusive use. *The King v. Russell*, 6 East, 427; *People v. City of St. Louis*, 5 Gilm. 571; *Hart v. Mayor of Albany*, 5 Wend. 584.

As to the jurisdiction of courts of equity to prevent a nuisance, or obstruction of a highway, by injunction: *People v. City of St. Louis*, 5 Gilm. 571; *Green v. Oakes*, 17 Ill. 249; *Corning v. Lawrence*, 6 Johns. Ch. 439; *Hills v. Miller*, 3 Paige, 254; *Chicago and Vincennes R. R. Co. v. People*, 92 Ill. 170.

If by contiguity be meant actual contact, then the property of complainants can not be said to be contiguous; but this term, we conceive, is to be taken in a wider sense, so as to embrace property specially damaged by the obstruction. *Green v. Oakes*, 17 Ill. 250; *Craig v. People*, 47 id. 487; *Carter v. Chicago*, 57 id. 281; *Corning v. Lawrence*, 6 Johns. Ch. 254; High on Injunctions, sec. 528.

MESSRS. PUTERBAUGH & PUTERBAUGH, for the appellee:

As to the power of a city to authorize the laying of a railroad track in and along its public streets, counsel cited *Moses v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.* 21 Ill. 516; *Murphy v. City of Chicago*, 29 id. 279; *Stetson v. Chicago and Evanston R. R. Co.* 75 id. 74; *Patterson v. Chicago, Danville and Vincennes R. R. Co.* 75 id. 588; *City of Quincy v. Chicago, Burlington and Quincy R. R. Co.* 92 id. 23.

The laying of a railroad track upon a street will not be enjoined at the suit of an adjacent land owner, who simply

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owns up to the line of the street, and over whose land the road does not pass, where no special damage is shown to the complainant different from that to all the other property owners. High on Injunctions, secs. 522, 533; *Bigelow v. Hartford, etc.* 14 Conn. 565; *O'Brien v. Norwich, etc.* 17 id. 372; *Frink v. Lawrence*, 20 id. 117, and cases cited *supra*.

The rule requiring complainants to show a special injury peculiar to themselves, distinct from the general inconvenience experienced by the public, is inflexible. *Corning v. Lawrence*, 6 Johns. Ch. 439; *McCowan v. Whitesides*, 31 Ind. 235; *Davis v. Mayor*, 4 Kern. 506; *Dawson v. St. Paul, etc.* 15 Minn. 136; High on Injunctions, sec. 528.

Mr. Justice Scott delivered the opinion of the Court:

In view of the previous decisions of this court it will not be necessary to enter upon any elaborate discussion of the questions raised on this bill. Private individuals, owning property and carrying on business in the vicinity, seek to enjoin defendants from laying a side-track in the street in front of their own property, to connect with any railroad previously constructed in the street. It is alleged in the bill an ordinance was about to be passed by the city council of Peoria that would authorize defendants to do the acts the injunction was intended to prevent. Conceding, as the bill does, the ordinance of the city will warrant the action of defendants in constructing a railroad track in the street, it must be considered as definitely settled by the previous decisions of this court that equity will not entertain jurisdiction to restrain the contemplated act. It is not alleged any portion of complainants' lands will be taken or touched by the proposed railroad track, nor are complainants abutting land owners. Their property is in the vicinity, on the same street, but not adjacent to the proposed improvement. The railroad track is to be constructed on the street, the fee of which, it is conceded, is in the corporation granting the privi-

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lege to lay such track. When this bill was filed, the side-track was not then constructed. It was to be built under, and in conformity with, an ordinance of the city council. No direct injury would be done to complainants' lands, and at the utmost only consequential damages would be sustained. The nature and extent of such damages could only be ascertained after the completion of the work. It may be, if the ordinance granting the license shall be observed in the construction of the side-track, no serious detriment will result to complainants or others from its construction. But be that as it may, the track is to be constructed on lands not owned by complainants, and under a license from the only party having lawful authority to grant the privilege, and any expected damages that may be sustained by reason of the proposed work, can only be recovered in an action at law. Equity will not entertain jurisdiction to enjoin the proposed work. The rule of law on this subject is so well settled by previous decisions of this court, it is not deemed necessary to discuss it again as a new question. The following cases contain a full expression of the views of the court on the questions discussed by counsel in this case: *Stetson v. Chicago and Evanston R. R. Co.* 75 Ill. 74; *Patterson v. Chicago, Danville and Vincennes R. R. Co.* 75 id. 588; *Peoria and Rock Island Ry. Co. v. Schertz*, 84 id. 135; *Cairo and Vincennes R. R. Co. v. The People*, 92 id. 170.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Mr. JUSTICE MULKEY, dissenting:

I do not concur in the decision of this case. It is, in my judgment, a new and dangerous departure from well established fundamental principles. The necessary effect of it will be to invite encroachments upon public rights for the benefit of a favored few, and place such as are unable to protect themselves at the mercy of those who, by their power

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and influence, are able to control municipal legislation in obtaining grants of exclusive privileges, often to the detriment, and sometimes ruin, of their less influential neighbors.

It is true the fee of the streets is generally, as in the present case, in the corporation, yet they are held in trust for the people generally, and can only be used for the ordinary purposes of streets. They can not be lawfully used for any purpose which is not open alike to all classes of persons, without regard to whether they are powerful and influential, or otherwise. Any attempt on the part of municipal authorities to appropriate public streets, or any part of them, to the exclusive use or benefit of a mere private person or corporation, to the injury of neighboring proprietors, is a manifest breach of a public trust, and a flagrant outrage upon private rights, and a court of equity, in such cases, is the only forum that affords an adequate remedy. To say that equity will not interpose in such cases, to me seems like confounding all distinctions between equitable and legal remedies, and denying equitable jurisdiction in matters of trust,—a class of cases supposed by Story and other eminent authors to be cognizable in courts of equity only.

The present case is simply this: The municipal authorities granted to appellee, an extensive manufacturing company, the right to construct and put in operation a railway in one of the public streets of the city, to be used exclusively by the company in the transaction of its own private business, in which the public had no interest whatever. The direct effect of building and operating this railway will be to destroy the street altogether for the ordinary purposes of a highway, and thereby materially injure the property and business of appellants carried on upon and near the street in question, and the decision in the present case holds that equity will not interpose, by injunction, to prevent an injury of this kind. No authority is cited which sustains it, and I confidently assert none can be found. If the proposed rail-

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way, when put in operation, would be open to the public generally, then I concede, under the previous decisions of this court, an injunction would not lie at the suit of a private individual, however much he might be injured by the building and operating of such a road. But such is not the case here. The city had the right to permit a railway to be constructed in one of its streets which, when completed, would be open to the public generally, for the carriage of goods or passengers, or both, on equal terms to all; but it had no authority to permit such a road to be constructed or operated for the exclusive use of a mere private company. In the one case the city has a discretion to do or not do; in the other, there is no power to act at all. In the former case, equity will not interpose, but remit the parties to a court of law, and such relief as that tribunal affords. In the latter case, there being a total want of authority on the part of the city to act at all, and the attempt to do so being a clear breach of a public trust with respect to the ownership and control of the streets, a court of equity, according to all the authorities, should and does interpose.

If a city may make such a grant as this at all, it may absolutely fill a public street with mere private structures and enterprises, in which the public generally have not a particle of interest, to the detriment and utter ruin of other property and business in the neighborhood, and in such cases nothing but the restraining power of a court of equity affords anything like adequate relief. To remit him to a court of law, under such circumstances, amounts to a simple denial of justice. While a suit in a court at law, which is powerless to avert the threatened injury, is dragging its slow length along through the various courts to final determination, one's property may be ruined, his business broken up, and he in the end will be permitted to recover only for the immediate results of the original wrong. A flourishing and profitable business is gone, which he perhaps can never again

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restore. All his prospective profits are swept away from him by the wrongful act of the defendant, and he is not permitted to recover anything on account of them.

Under the present decision this almost fruitless suit at law is the only remedy which an enlightened jurisprudence affords. I repeat, this is simply a denial of justice. I hold it to be one of the highest duties of the courts of the country to steadily and firmly resist all encroachments of power upon the rights of the people. This, I submit, has not been done in the present case, and for this and other reasons already assigned, I respectfully, but earnestly, dissent from the conclusion reached by a majority of the court.

MR. JUSTICE WALKER, and MR. JUSTICE DICKEY: We fully concur in the views expressed in the above dissenting opinion.

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

PER CURIAM: The only question argued on the motion for a rehearing, and not discussed in the original opinion, that is deemed necessary now to be remarked upon, is the point made that the side-track, although constructed under an ordinance of the city granting a license to lay it in a public street, is solely for the "convenience and benefit" of the corporation constructing it. This is a misapprehension of the law. Section 12, art. 11, of the constitution, provides, that "railways heretofore constructed or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." The track defendant was authorized by ordinance to construct, when completed and attached to the principal track, is as much a "public highway," in the sense that term is used in the constitution, as is the road of

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the company to which it is attached, and no doubt is entertained the company is subjected to the same duty to use it for the "convenience and benefit" of the public as any part of its main track.

It is different, as this court has decided in *Kælle v. Knecht*, 99 Ill. 396, where such structures are built by individuals on their own lands for mere private use. But that is not the case here. This track was laid, or is to be laid, in a public street, under an ordinance of the city granting the privilege. It will be perceived, on examination, the ordinance contains nothing that indicates the switch, when built, was to be for the sole use of the corporation constructing it. On the contrary, the corporation, in its answer, denies it will prevent the use and occupation of the street by the public. Since its construction this switch is a part of the main track with which it is connected, and is in the same sense a "public highway," to be used by the company for the same purposes, "under such regulations as may be prescribed by law."

The petition for rehearing will be denied.

Rehearing denied.

CHARLES H. HIRSCHMAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

1. CRIMINAL LAW—EVIDENCE—on indictment for manslaughter—as tending to explain conduct of accused. On a trial of one for manslaughter, in shooting his father, who was shown to have been of a quarrelsome disposition when under the influence of liquor, and ill-tempered, and abusive towards his wife, the defendant's counsel offered to prove by a witness that the defendant in going to and from his work had to pass by the house of the witness, and that she knew of her own knowledge that it had been the uniform habit of the defendant, at all times when he knew that there was at the time

101 568
143 598
146 633

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101 568
218 *289

Syllabus.

difficulty between his mother and the deceased, to refrain from going home, so as to keep out of the same, at such times expressing a desire to avoid being present, and that the difficulties between the deceased and his wife were of frequent occurrence about the time of the killing: *Held*, that all of such evidence was properly excluded, as not tending to enlighten the issue.

2. *SAME—as to previous conduct of the deceased.* On such trial, it appeared that, at the time of the killing, the father was intoxicated and angry, and just preceding the act of shooting he had been engaged in a quarrel with his wife—the defendant's mother—but it was *held*, evidence of the previous conduct of the deceased towards his wife was not admissible as tending to show whether the shooting was accidental, or in self-defence, or was willfully and maliciously done.

3. *SAME—as to previous good character of accused—evidence in respect thereto—and its effect.* On the trial of one for manslaughter, the defendant is allowed to give evidence only of his previous *general* character in regard to peace and quiet, etc., and not proof of particular transactions in which he may have been previously concerned. The witness can not be called upon for his personal knowledge of the prisoner's acts and conduct.

4. On a charge of crime the previous good character of the accused is but a circumstance to be considered by the jury, in connection with all the other evidence, in determining the question of guilt or innocence. If the evidence of guilt is complete and convincing, when considered with the evidence of previous good character, the evidence of good character will not avail.

5. *INSTRUCTION—as to good character—construed.* On the trial of one for manslaughter, an instruction that the defendant's evidence of his general reputation for peaceableness was allowable, and should be considered by the jury as a circumstance in the case; but that if, from all the evidence in the case, the jury were satisfied, beyond a reasonable doubt, of the guilt of the accused, it was their duty to find him guilty, notwithstanding the fact he had before borne a very good character for peaceableness, was *held* not erroneous, as in effect directing the jury to disregard the proof of good character.

6. *SAME—as to credibility of impeached witness.* An instruction that the testimony of a defendant in a criminal case is to be tested by the same rules applicable to other witnesses in determining his credibility and the weight of his evidence, and that if the jury, after considering all the evidence in the case, find the accused has willfully and corruptly testified falsely to any fact material to the issue, they have the right to entirely disregard his testimony, excepting in so far as it is corroborated by "other credible evidence," is not erroneous. The "other credible evidence," in such connection, includes all kinds and every kind of evidence.

7. *WITNESS—credibility of defendant in criminal case.* The jury in a criminal case are not bound to believe the testimony of the defendant, any further than it may be corroborated by other credible evidence, and there is no impropriety in so instructing them.

Brief for the Plaintiff in Error.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. KIRK HAWES, Judge, presiding.

Messrs. J. N. & W. F. BARKER, and Mr. ROBERT HERVEY, for the plaintiff in error:

The court erred in excluding the testimony as to the universal habit of the boy in keeping away from home at all times when he knew there was a difficulty between his mother and his step-father. Wharton on Criminal Law, sec. 1327.

As a defence, character for truthfulness may be set up, and Lord DENMAN once permitted the following questions: "What is the character for veracity and honor?" and, "Do you consider him a man likely to commit perjury?" See Wharton on Crim. Ev. 60.

"And the character he is entitled to prove must be such as would make it unlikely that he would be guilty of the particular crime with which he is charged." 1 Wharton on Crim. Law, sec. 646. See, also, 2 Russell on Crimes, 784, 785, and cases cited; 1 Greenleaf on Evidence, 54.

"It is conceded on all sides that evidence of character, when offered by the defence in criminal cases, is always relevant. Technically, therefore, it is always material." Wharton on Crim. Ev. 66. See, also, *Remsen v. People*, 57 Barb. 324; *Epps v. State*, 19 Ga. 102; *Harrington v. State*, 19 Ohio, 264.

Hence it is error in a judge to tell the jury, that "in a plain case a good character would not help the prisoner, but in a doubtful case he had a right to have it cast into the scales and weighed in his behalf," (*State v. Henry*, 5 Jones, (N. C.) 65,) the true rule being that in all cases a good character is to be considered of weight. *United States v. Whitaker*, 6 McLean, 342; *Cancemi v. The People*, 16 N. Y. 505; *Stover v. The People*, 56 id. 319; *People v. Ashe*, 44 Cal. 288; *People v. Bell*, 49 id. 486; *People v. Shepard*, id. 629.

Brief for the People.

The court erred in the third instruction, which assumes that the defendant is contradicted, and calls attention to isolated facts, and is erroneous in form and substance, as settled by decisions of this court. It gives undue prominence to an isolated fact, viz: the testimony of the accused, and is defective in its closing sentence, as held by this court in *Angelo v. Faul*, 85 Ill. 106.

An instruction as to what the presumption of law is upon a disputed fact, is extremely likely to mislead the jury, and should not be given. *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35; *Garretson v. Pegg*, 64 id. 111; *Cornwell v. Cornwell*, 91 id. 414.

When the court assumes to direct the attention of the jury to the facts, it should refer them to all the facts, so as to present the case fairly for both parties. *Evans v. George*, 80 Ill. 51; *Ogden v. Kirby*, 79 id. 556; *Elston Gravel Road Co. v. The People*, 96 id. 584.

Mr. JAMES McCARTNEY, Attorney General, for the People:

The instruction complained of does not in fact exclude from the consideration of the jury evidence of the defendant's character. It but tells the jury, that if, "from *all* the evidence in the case, they are satisfied," etc., how to find. There is nothing objectionable in this.

There is no error in the instruction to disregard the testimony of an impeached witness, except so far as it is corroborated by other credible evidence. See *Angelo v. Faul*, 85 Ill. 106; *Huddle v. Martin*, 54 id. 258; *Crabtree v. Hagenbaugh*, 25 id. 233; *Yundt v. Hartrunft*, 41 id. 9; *Miller et al. v. People*, 39 id. 457.

Mr. LUTHER LAFLIN MILLS, State's Attorney for Cook county, and Mr. HENRY W. THOMPSON, assistant State's Attorney, also for the People.

Opinion of the Court.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Michael Boylan was shot and instantly killed by means of a pistol in the hands of his step-son, Charles H. Hirschman, on the evening of August 28, 1880, at Hyde Park, in Cook county. Because of this killing, Hirschman was subsequently convicted, by the circuit court of Cook county, of the crime of manslaughter, and sentenced to the penitentiary for the term of three years, and this writ of error is prosecuted for the purpose of having us review the record of that conviction. The main defence interposed upon the trial was, that the shooting was accidental, although it was also contended that the defendant, under the circumstances, would have been justified in taking the life of the deceased as in his necessary self-defence.

The defendant and a sister, as also several half sisters, children of the deceased, were residing in the family of the deceased, with their mother. The deceased was a teamster, employed, through the day, away from the house, and on the evening in which he was killed he returned home late—near nine o'clock—and, the evidence shows, in an intoxicated condition. When intoxicated he was ill-tempered, and frequently abusive and violent towards his wife and other members of his family. On this occasion, it appears, in consequence of not receiving a satisfactory answer as to the quality of the supper that awaited him, he became abusive towards his wife, and the defendant and his sister. However, he ate his supper, and then examined the feed of his horses, and cut some green grass for them. Preliminary to this, and in order to sharpen his scythe for cutting the grass, he procured a whetstone. After cutting the grass, he went to the well, which was near the porch, and commenced pumping water for his horses. Quitting this, he advanced towards the house, and was in the act of ascending the steps leading up to the porch, when he received the fatal shot from the pistol

Opinion of the Court.

in the defendant's hands. It is claimed the defendant had been up-stairs playing cards with a young friend, and knew nothing of the conduct of the deceased until he came down stairs to see his friend depart; that immediately after his friend had departed he went upon the back porch; that the deceased, who was then pumping the water, on seeing him there quit his pumping, and with the stone with which he had whetted his scythe in his hand, advanced rapidly up the steps towards the defendant, uttering an abusive epithet, and aimed a blow at him with the stone, when the defendant, in endeavoring to retreat, fell, and the pistol was accidentally discharged. It is claimed the defendant had had the pistol for some time, and on this evening had been oiling it, and temporarily put it in his pocket to await the departure of his friend before putting it away, and thus it was in his pocket when the deceased rushed upon him.

Upon the trial, one Mrs. Moots testified that she had known the defendant for ten years,—that he was a very good boy—"no fighting, no quarreling," adding: "People can't tell that Charlie is bad. All the neighbors say that Charlie is good." And thereupon the counsel for the defendant addressed the court as follows: "We offer to prove by this witness that the defendant, in going to and from his work, had to pass by her house, and that she knew of her own knowledge that it had been the uniform habit of defendant, at all times when he knew that there was at the time difficulty between his mother and the deceased, to refrain from going home, so as to be able to keep out of the difficulties, the defendant at such times expressing the desire to avoid being present at the time of such difficulties." And the counsel also proposed to prove by the witness that she knew that difficulties between deceased and his wife were of frequent occurrence at the time of defendant passing her house, etc., but the court refused to admit all and every part of such evidence to be given, and defendant excepted. The errors

Opinion of the Court.

assigned question this ruling, and counsel, in argument, insist it was erroneous.

It will have been observed that the witness was permitted to give evidence of the *general* character of the defendant in regard to peace and quiet, etc., and this is as far as the authorities go. Roscoe's *Crim. Evidence*, (5th Am. ed.) 97; 1 Greenleaf on *Evidence*, sec. 55. Says Wharton, in his work on *Crim. Law*, vol. 1, latter part of sec. 636, (7th ed.): "The proper question is, not 'personal knowledge' by the witness, but the defendant's 'general reputation.'" The quotation of this author in sec. 646, from Mettermaier, which counsel have copied into their brief, as shown in the latter part of the section, is not the law here. In 2 Russell on *Crimes*, 784, (7th Am. ed.) the author, after explaining that in all criminal prosecutions the prisoner is always permitted to call witnesses to speak of his general character, etc., adds: "The inquiry must also be made with reference to the general character of the prisoner, for it is general character alone which can afford any test of general conduct, or raise a presumption that the person who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part, and, therefore, proof of particular transactions, in which the prisoner may have been concerned, are not admissible." See, also, *McCarty v. The People*, 51 Ill. 231; *Hopps v. The People*, 31 id. 385; Wharton's *Criminal Evidence*, (8th ed.) sec. 60; *Cathcart v. Cowen*, 37 Pa. St. 108.

We are unable to perceive any theory upon which the conduct of the deceased towards his wife would, in consonance with established legal principles, tend to elucidate whether the defendant's pistol was discharged by accident, or whether he discharged it in his necessary self-defence, or willfully and maliciously. And however reluctant the defendant may, in general, have been to be present at the quarrels between the deceased and his mother, there is no question that a pistol in

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his hands was discharged, and resulted in the death of the deceased. It is certain he was then near the deceased. We think the evidence was properly excluded as not tending to enlighten the issue.

The second instruction given by the court, at the instance of the People, is as follows:

"The court instructs the jury, as a matter of law, that the defendant has put in evidence his general reputation for peaceableness; that such evidence is permissible under the law, and is to be by the jury considered as a circumstance in this case. But the court further instructs the jury, that if, from all the evidence in this case, they are satisfied beyond a reasonable doubt of the guilt of the accused, then it is the duty of the jury to find him guilty, notwithstanding the fact that heretofore the accused has borne a very good character for peaceableness."

Counsel for defendant insist this is erroneous, because they say it in effect tells the jury to disregard the proof of good character. We do not think this is a reasonable construction of the language employed in the instruction. The jury are therein expressly told that they are to consider the proof of good character as a circumstance in the case. Instead of being told to disregard it, they are told directly the reverse. Good character is but a circumstance to be considered in connection with all the evidence, in determining the question of guilt or innocence. But if the evidence of guilt be complete and convincing, (which implies a consideration of the evidence of previous good character, as well as all other evidence,) then it is well settled law the evidence of previous good character can not, and ought not, to avail. And this is as far as the instruction goes.

The court also, at the instance of the People, in their third instruction, said to the jury:

Opinion of the Court.

"The court instructs the jury, as a matter of law, in this State the accused is permitted to testify in his own behalf; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness, and in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor and conduct upon the witness stand, and during the trial; and the jury are to take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses. And the court further instructs the jury, that if, after considering all the evidence in this case, they find that the accused has willfully and corruptly testified falsely to any fact material to the issue in this cause, they have the right to entirely disregard his testimony, excepting in so far as his testimony is corroborated by other credible evidence."

Counsel for defendant object that this assumes that the defendant is contradicted,—that it gives undue prominence to an isolated fact, viz: the testimony of the accused, and also that it is defective in its closing sentence, as held by this court in *Angelo v. Faul*, 85 Ill. 106. The objection to the instruction in *Angelo v. Faul* was, that it omitted to include the words "on or by circumstances in evidence." But here the jury are told they are at liberty to disregard the evidence of the defendant, except "in so far as his testimony is corroborated by other credible evidence,"—that is, all kinds, or any kind, of evidence that may be before the jury, and not limited, as in *Angelo v. Faul*. We do not think it can be fairly said that this instruction assumes that the defendant is contradicted, for that is expressly left a question to be determined by the jury. The jury were not bound to believe the evidence of the defendant any further than it may have been corrob-

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rated by other credible evidence, (*Gainey v. The People*, 97 Ill. 270,) and we perceive no impropriety in saying so to them. The instruction, in substance, is sustained by *Crabtree v. Hagenbaugh*, 25 Ill. 233, *Yundt v. Hartrunft*, 41 id. 9, *Miller v. People*, 39 id. 457.

Finally, it is contended as a reason why the judgment below should be reversed, it is not sustained by the evidence. We are not convinced that the court below erred in this regard. There are many and very great improbabilities in defendant's story that the shooting was accidental. His account of why, in the first instance, he procured a pistol, is not satisfactory, and still less so is his version of why he took it with him down stairs at the time he admits he did. Its proper place, by his own showing, was in his room up stairs. It approaches the marvelous, to say the least, that the deceased could have accidentally come to his death in the manner claimed. But the defendant himself, according to the testimony of Joseph Snyder, on the day after Boylan was killed, admitted that he shot and killed Boylan. He says: "I am captain of Hyde Park police. I saw Charles Hirschman, August 29, 1880, in the station; had a conversation with him. I went into his cell to see if I knew the boy. I saw that I did not know him,—never saw him in the police station before. I said to him, 'This is a pretty sad affair.' He said, 'Yes, sir; have you heard from mother this morning?' I said, 'No, I had not been down.' I says to him, 'Boylan is dead.' He said, 'Yes, he is dead.' Says I, 'How far were you from him when you shot him?' He said, 'About eight feet.' Says I, 'Where do you think you hit him?' He says, 'Near the center of the breast, I think.' Then I asked him, did Boylan strike him. He said, no. Did he strike your mother? He said, no. He said Boylan was having some words with his mother, and he walked down stairs and shot him." * * *

We can not say this evidence should be disbelieved. The jury saw and heard the witness, and all that the able and eloquent counsel could urge to discredit him, and evidently still believed him. This evidence repels the theory that the shooting was in self-defence, as well as that it was accidental. We can have but little doubt that the defendant had witnessed the repeated brutal outrages, by speech and by blow, of the deceased upon his mother, and endured his reproaches and insult to himself until he became almost crazed with passion, and that then, under its influence, he fired the fatal shot; and this was, as the jury have found, not justifiable or excusable homicide, but manslaughter, if not, technically, a more serious crime.

The judgment is affirmed.

Judgment affirmed.

101	578
128	272
101	578
174	180

THE PRESBYTERIAN THEOLOGICAL SEMINARY OF THE NORTHWEST
v.

THE PEOPLE *ex rel.* W. T. Johnson, Collector.

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

TAXATION—*what property of institutions of learning is exempt.* Land belonging to an institution of learning upon which the buildings or "institutions" are not located, and which is not shown to be "used exclusively" for the interests of the corporation, is subject to taxation, and is not exempt under the present legislation.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Mr. WM. C. GOUDY, for the appellant, contended that the five acres which is taxed was real estate on which an institution of learning is located, within the meaning of the statute, and consequently exempt from taxation. The division of it from the other land does not change its character. The

Brief for the Appellee.

exemption is of all the property of an institution of learning, and not merely of the real estate on which the institution is located.

It is clear that if the clause, viz: "including the real estate on which the institutions are located," was not in the statute, all the property, real and personal, of this appellant, "not leased or otherwise used with a view to profit," would, beyond any question, be exempt from taxation, for the word "property," in tax exemptions, includes everything capable of ownership. *Primm v. Belleville*, 59 Ill. 142; *Home for Friendless v. Rouse*, 8 Wall. 430; *Washington University v. Rouse*, 8 id. 438; *Atwater v. Woodbridge*, 6 Conn. 223.

Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *Arrington v. Smith*, 28 Wis. 43; *Tynan v. Walker*, 35 Cal. 634; *Warfield v. Fox*, 53 Pa. St. 382; *Encking v. Simmons*, 28 Wis. 272.

Applying the principles of these cited cases to the case at bar, it is evident that there is no express limitation to limit the general words here used, and a limitation can not be implied. The fact that by sub-section 2 of the exemption section of the Revenue act, church property only is exempt when actually used for public worship, is no argument against this appellant's view.

Mr. CONSIDER H. WILLETT, for the appellee:

The claim of appellant that "all property," meaning all real estate of any theological seminary, no matter where located in the State, is exempt from taxation, has no support in the language of the statute creating the exemption.

Let us examine this exemption, "all property described in this section, to the extent herein limited." First, "all lands donated by the United States for school purposes not sold or leased." The exemption rests upon "all lands donated by the

Opinion of the Court.

United States for school purposes" until sold or leased, at which time or event the exemption is destroyed. "All public school houses." "All property of institutions of learning * * * not leased by such institutions or otherwise used with a view to profit." "Including the real estate on which the institutions are located," means that all real estate shall be taxed except that upon which the institution is located. Exemption is the exception, and taxation is the rule. *First Methodist Episcopal Church v. Chicago*, 26 Ill. 482; *People v. Western Seamen's Friend Society*, 87 id. 246; *Washington College v. Com. of Shawnee County*, 8 Kan. 344.

Where exemptions are claimed they must be clear and unequivocal, and all doubts are to be solved in favor of the State and against the exemption. The intention of the State to bind itself by an exemption must be clear, as all presumptions are against it. *Cooley on Taxation*, 54.

In *Academy of Fine Arts v. Philadelphia*, 22 Pa. St. 496, it was held that an exemption of universities, colleges, academies and school houses did not extend to an academy of fine arts, "as none can claim an exemption unless the exemption be so clearly expressed in the statute as to admit of no other construction."

In *Crawford v. Burrell*, 53 Pa. St. 219, it is said: "Taxation is an act of sovereignty, to be performed, so far as it conveniently can, with justice and equity to all. Exemptions, no matter how meritorious, are of grace, and must be strictly construed."

An exemption from all taxation in the charters of churches and schools will not exempt them from assessments for local improvements. *Cooley on Taxation*, 147.

MR. JUSTICE SCOTT delivered the opinion of the Court:

This was an application by the county collector of Cook county for judgment against lands and lots for unpaid taxes for the year 1880, and prior years. Among other lands against

Opinion of the Court.

which judgment was sought was a tract of land, consisting of five acres, belonging to the Presbyterian Theological Seminary of the Northwest. That institution is a corporation existing under the laws of the State of Illinois, and the object, as set forth in the preamble to the act creating the corporation, is to establish an institution for the education of young men for the Christian ministry.

Evidence introduced shows the corporation acquired the tract of land assessed, by deed dated May 1, 1863. The school buildings are situated on another tract of land owned by the corporation, which consists of twenty acres. The deed for the tract assessed contains, among other provisions, one that the buildings of the seminary should be erected on the large tract of land conveyed to it, and should be maintained for the purposes of the institution during a period of twenty-five years, and also a provision that unless the corporation observed the conditions written in the deed, the land should revert to the donors. The two tracts were obtained from different grantors by deeds bearing the same date, and are now separated by Fullerton avenue,—a street, although the width is not stated, may be understood to be of the usual width. Concerning the facts of the case there is no disagreement.

Section 3, art. 9, of the constitution, provides that property, both real and personal, used "exclusively" for certain charitable purposes enumerated, may be exempted from taxation. Accordingly the General Assembly has enacted, that among property that shall be exempt from taxation is "all property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions, or otherwise used with a view to profit." It is under this clause of the statute the objecting corporation seeks exemption from taxation. The act of the General Assembly cited must be read in connection with the section of the constitution on the same subject. It must, therefore, be understood

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the legislature only intended to exempt such property of institutions of learning as "may be used exclusively" for the objects and purposes of such institutions. The buildings or "institutions" of the corporation are not located on the tract of land assessed. As we have seen, the buildings are situated on a much larger tract, separated from it by a street of the usual width. Nor can it be said the tract assessed is "used exclusively" for the benefit of the seminary. It is fenced all around, but according to this record it does not appear to be used for any purpose. It is not even leased, so as to make it a source of income to the institution.

It is to be observed the real estate belonging to institutions of learning that shall be exempt from taxation is limited by the express terms of the statute to that upon which the "institutions are located," and it is not within the province of the courts, by construction, to declare that other property shall be exempt. The General Assembly could rightfully exempt only such property as "may be used exclusively" for the purposes of institutions of learning. It is not to be understood the act of the General Assembly on this subject is broader in its scope than the constitution itself.

As the "institutions" of the corporation defending are not located on the tract of land assessed, and as it does not appear, from anything in the record, it is "used exclusively" for the interests of an "institution of learning," it is subject to taxation as other property of the citizen, or that of a private corporation.

The judgment will be affirmed.

Judgment affirmed.

MR. CHIEF JUSTICE CRAIG, MR. JUSTICE DICKEY, and MR. JUSTICE SHELDON, dissent.

Syllabus. Statement of the case.

THE CHICAGO AND IOWA RAILROAD COMPANY *et al.*

v.

ISAAC M. MALLORY *et al.*

101	583
123	132
123	133
123	135
22a	136
101	583
42a	524

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

1. **MUNICIPAL BONDS**—*burden of proof is on party asking their issue.* In a suit by a railroad company to enforce the issuing of bonds by a municipality for its use, the burden of proof is upon the railroad company to show affirmatively that the issue of the bonds was authorized by a vote of the people, had pursuant to a law providing therefor, prior to the adoption of the present constitution, and the law under which the election is held must be substantially complied with, or the election will confer no authority.

2. **SAME**—*of the validity of the election.* Where a law for an election to determine whether a subscription, etc., shall be made by a town to aid a railroad corporation, provides that "such election shall be held and conducted, and returns thereof made, as is provided by the Township Organization law in towns organized under said law," an election held on the question, as in the case of an ordinary town meeting, presided over by one moderator only, with only one clerk, is void, and will confer no authority to issue the bonds of the town. Such a provision requires the election to be held by three judges and two clerks, as in general elections. The words "town meeting," and the word "election," as used in the Township Organization law, are not convertible terms.

3. **TOWN MEETINGS**—*distinguished from an election.* The words "town meeting" have a definite and well settled meaning in the Township law, and are always used to describe the annual town meetings of the electors of the town for the purpose of electing town officers, and transacting such other business as the electors are authorized to transact, or special meetings of the electors for such purposes called pursuant to law. Such meetings are clearly distinguishable from "elections," when there is no other business transacted but to elect officers.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Stephenson county; the Hon. WILLIAM BROWN, Judge, presiding.

Bill was filed in the circuit court of Ogle county, by Isaac M. Mallory, Daniel Shockley, and Samuel L. Bailey, tax-payers of the town of Flagg, in Ogle county, against the Chicago

Briefs of Counsel.

and Iowa Railroad Company, and certain officers of said town of Flag, to enjoin the issuing to the Chicago and Iowa Railroad Company of \$50,000 of the bonds of the town, payable ten years after date, and bearing interest at the rate of ten per cent per annum, etc., as a donation to the railroad company. By an amendment made subsequent to the filing of the bill, the Chicago and Northwestern Railway Company, as a tax-payer of the town, was made a co-complainant, and W. H. Holcomb, receiver of the Chicago and Iowa Railroad Company, was made defendant.

Answer having been filed by the Chicago and Iowa Railroad Company, that company and its receiver filed its cross-bill, praying that the bonds sought to be enjoined be issued. Answers and replications were filed, properly presenting issues on the allegations of the original and cross-bills.

On the hearing, the cross-bill was dismissed, and the prayer of the original bill granted. An appeal was prosecuted from that decree to the Appellate Court for the Second District, where, on hearing, the decree of the circuit court was affirmed, and from that judgment this appeal is prosecuted.

Mr. GEO. W. COTHMAN, and Mr. GEO. W. KRETZINGER, for the appellants, insisted that the charter of the railroad company controlled in all matters concerning the election, and that all its provisions in that regard had been complied with.

Mr. B. C. Cook, for the appellee the town of Flag:

1. The burden of proof to show that the donation was authorized by a vote of the people of the town of Flag, under existing laws before the adoption of the constitution, rests wholly on appellants. *Wright v. Bishop*, 88 Ill. 303; *Middleport v. Aetna Life Ins. Co.* 82 id. 568; *Jackson County v. Brush et al.* 77 id. 65; *Springfield and Illinois Southeastern Ry. Co. v. Coldspring Township*, 72 id. 603; *Schall et al. v. Bowman et al.* 62 id. 321; *People v. Jackson County*, 92 id. 450.

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2. The law under which it is claimed that an election was held, did not provide for submitting the question at a town meeting, but at a regular election. Secs. 56 and 68, Township law; *People v. Town of Laenna*, 67 Ill. 65; *People v. Town of Santa Anna*, 68 id. 28; *Lippincott v. Town of Pana*, 92 id. 24.

3. No bonds, such as are claimed, were ever voted by the town. The voters of the town had the right to prescribe the conditions upon which the donation should be made and the bonds issued. *People v. Cass County*, 77 Ill. 440; *Jackson County v. Brush et al.* 77 id. 63; *People v. Glann et al.* 70 id. 234; *People v. Dutcher*, 56 id. 145; *People v. Chapman*, 66 id. 138; *Ramsey v. Hoeger*, 76 id. 444.

4. The burden of proof is upon the party alleging the validity of the election, to show affirmatively that the vote was legal. *Supervisors of Jackson County v. Brush*, 77 Ill. 59; *Town, etc. v. Ins. Co.* 82 id. 562; *People v. Board of Supervisors*, 92 id. 450, and authorities cited on the first point.

5. The Township law referred to in the charter, provides that all elections held under it, except certain specified ones, of which this election was not one, shall be holden in the manner provided by the general Election law of the State. This is precisely equivalent to a direct provision in the charter that the election shall be holden in the manner provided in the general Election law, and brings the case directly within the cases of *Lippincott v. Town of Pana*, 92 Ill. 24, and *People v. Town of Santa Anna*, 68 id. 28.

6. Under the Township law no returns are required to be made of the votes for the election of town officers. It only requires a canvass of the votes. Sec. 67, Township law.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Agreeing, as we do, with the view entertained of this case by the lower courts, it will be necessary to notice but a single question.

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The burden is upon the railroad company asking the enforcement of the issuing of the bonds, to show, affirmatively, that the bonds are authorized to be issued by a vote of the people, had pursuant to a law providing therefor, prior to the adoption of the present constitution, (*Wright v. Bishop*, 88 Ill. 303, *Middleport v. Aetna Life Ins. Co.* 82 id. 568, *People v. Jackson County*, 92 id. 453,) and the law under which the election is held must be substantially complied with, or the election will confer no authority; and so it has been ruled, an election held and conducted as a special town meeting, under a law requiring the election to be held and conducted, and returns thereof to be made as in general elections, will be a nullity, and confer no power to issue bonds of the town. *Lippincott v. Town of Pana et al.* 92 Ill. 24; *People ex rel. v. Town of Santa Anna*, 67 id. 57; *People ex rel. v. Town of Laenna*, id. 65.

What is here claimed to have been an election authorizing the issuing of the bonds, was but a special town meeting, presided over by a moderator, and without the judges or clerks required in general elections. The question is, whether this is such an election as is authorized by the charter of the Chicago and Iowa Railroad Company, under the authority of which it is claimed to have been held.

The twelfth section of the charter of that company, (vol. 2, p. 163, Private Laws of 1869,) in providing for the holding of an election to determine whether subscriptions, donations, etc., shall be made by the town, employs this language: "And such election shall be held and conducted, and returns thereof made, as is provided by the Township Organization law, in towns organized under said law." Now, it will be noted, the election is not to be held and conducted and returns thereof made, as the law requires in case of township elections, or of the election of township officers. If this had been the requirement, there would have been no room whatever for controversy, and it would seem of significance that

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this idea is not expressed. Had it been intended, why not have so said? But the language is general, and requires the election to be held and returns thereof made as is "provided by the Township Organization law." A particular kind of election is not designated as furnishing the guide, but a particular law. What, then, is "provided by the Township Organization law" on that subject? It provides for town meetings, in which township officers are to be elected, and to be presided over by a moderator, who, in addition to discharging the duties of presiding officer over the town meeting, "shall have the same power, and be subjected to the same penalties, as other judges of election." Rev. Stat. 1874, chap. 139, title "Township Organization," secs. 1, 2, 3, 4, 7, 8, 9, 10, art. 6, and secs. 1, 2 and 3, art. 7. It is also provided by statute that "each town shall constitute an election precinct, but the county board may divide any town into as many election districts as the convenience of the people may require, * * * and may, from time to time, designate the places at which elections shall be held. All general and special elections shall be held at the places so designated." Rev. Stat. 1874, chap. 46, title "Elections," sec. 31. And sec. 6, art. 6, of the Township Organization law, *supra*, provides that "the supervisor, assessor and collector of the town shall be *ex officio* judges of all elections in their town, except as otherwise provided by law." There is no reason, of which we have any conception, why this section can be held to be not embraced by the language of the charter quoted *supra*, namely: "provided by the Township Organization law." It is provided by, for it is a part of, the Township Organization law. It enacts a general rule, and whether any election is embraced by it, depends upon whether the law under which it is held provides for other or different judges, and no other or different judges being provided for by the railroad charter, those designated must act.

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But counsel insist this election must, in all respects, be conducted as a town meeting, and, therefore, must have had a moderator only. The force of this is not perceived. It might have been very appropriate to have so enacted, but the General Assembly was at liberty to enact as it pleased, and if it chose, as a safeguard to the tax-payers, to interpose an election with the restraints and guarantees thrown around general elections, instead of a town meeting, no one has a right to complain. The question is not one of propriety, but one of construction,—what was enacted? The words “town meeting” have a definite and well settled meaning in the Township law, and are uniformly used to describe the annual meetings of the electors of the town for the purpose of electing township officers, and transacting such business as the electors are by law authorized to transact, or special meetings of the electors for such purposes, called pursuant to law. The statute speaks of elections being held at or in such meetings, but never describes them by the word “election.” Thus, in sec. 1, art. 6: “The annual town meeting, in the respective towns, for the election of town officers, and the transaction of the business of the town, shall be held,” etc. In sec. 3, art. 6: “Each town, for the purpose of town meetings, constitutes an election precinct.” Secs. 2 and 5, art. 6, speak of the notices to be given for the holding of town meetings, and of the mode of changing the places for holding town meetings, the latter providing that that question may be included in the notices of such meeting, and “the electors may vote for and against,” etc. Sec. 7, art. 6, provides how special town meetings may be called, and secs. 8 and 9 of the same article provide for notice of special town meetings, and what it shall contain, and sec. 10 provides that the “electors at a special town meeting, when convened, shall have power, among other things, to fill vacancies in the offices of the town.” Sec. 1, art. 7, provides that “at the annual town meeting in each town there shall be elected, by

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ballot," certain town officers. Sec. 2 of the same article provides how regular and special town meetings may be called to order, and a moderator thereof elected, and this officer is uniformly styled and spoken of as "moderator of the town meeting." In sec. 5 of the same article the town clerk is made clerk of the town meeting, and in sec. 10 of the same article, the canvass of the votes being made, "the result shall be publicly read by the clerk to the meeting."

On the other hand, we know of no instance in which the word "election" alone, unaccompanied by any qualifying words pointing out its connection with a town meeting, is used to describe what is in reality a town meeting. The General Assembly must be presumed, in the enactment of the charter of the Chicago and Iowa Railroad Company, to have been mindful of this use of these terms, and to have employed language in the same sense; yet the words "town meeting" do not occur in that charter. The petition to be presented to the town clerk is not for a "town meeting," but for "an election to be held," etc. The notices to be posted are not, as in the cases of special town meetings, to be of "special town meetings," but of "an election to be held by the legal voters," and whenever mention is made of taking the vote of the electors, it is called an "election." It can not be said the words "town meeting," as used in the Township law, and the word "election," are convertible terms. There may, it is true, at a town meeting be nothing but an election, but there may be more. The theory of such a meeting is, that the corporate body of the town is present for the purpose of transacting, and competent to transact, all the corporate business of the town not specially delegated to certain individual officers, and, but for the statute requiring officers to be selected by ballot, this would manifestly all be done in open meeting, by resolution, or whatever other method would be agreed upon to ascertain the will of the majority.

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Again, by section 8, art. 7, of the Township Organization law, *supra*, "no registration of voters shall be required for the purposes of a town meeting." The meeting is held with open doors. All the electors so desiring are present, and each elector has an opportunity for detecting and exposing and prohibiting the participation of those not lawfully entitled to take part in the proceedings. But in case of general elections this is not so. The judges of those elections are authorized to allow not more than two legal voters, as challengers, of each party, in the room where the election is held. The elector, as a rule, casts his ballot and goes away. In a great measure the responsibility of detecting imposition and fraud is left with the judges of elections; but to enable them to protect the purity of the ballot-box, certain restrictions are imposed upon those seeking to exercise the elective franchise, among which is that of registration. And a circumstance, as we think strongly confirmatory of the view that it was intended an election, and not a town meeting, was to be held under the charter, is, that the charter, in its 13th section, expressly provides "the qualification of the electors at said election shall be determined by the registration next preceding said election." It is impossible the Registry law can be complied with at a town meeting. It requires (sec. 7, chap. 46, p. 470, Rev. Stat. 1874,) one of the registry lists to be delivered to the judges or inspectors, and one to be filed in the office of the town clerk, etc., and then provides that "it shall be the duty of said judges or inspectors so receiving such list carefully to preserve the said list for their use on election day, and to designate two of their number, at the opening of the polls, to check the name of every voter voting in such district whose name is on the register." And section 9 of the same act makes provision for the depositing and keeping of these lists after the election. The only difference between this and any other election, as respects the registry, is, obviously, here the judges use the old registry lists, while in the

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others they use lists specially prepared for the occasion. In all other respects the duties of the officers are the same.

It is said this provision in section 13 was unnecessary, and therefore meaningless, because it was already provided in the Township law that there need be no registry. Its necessity was a question for the General Assembly. It is very clear in its language, and by no fair rule of construction can it be held to be identical in meaning with the Township law on that subject. The distinction is between using an old registry list and using none at all. The Township law requires no list; the charter requires a list, but it is the old one.

We think the court below ruled correctly. Its decree will, therefore, be affirmed.

Decree affirmed.

CUTHBERT W. LAING, Admr.

v.

A. H. BURLEY.

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

NATIONAL BANKS—who is a “shareholder” that is made liable for debts of bank. While it may be true that a bank organized under the National Banking law may not be bound to admit a purchaser of shares of stock in the association to all the rights and liabilities of the prior holder, unless the transfer is made on the books of the bank in the manner prescribed by the by-laws or articles of association, yet where it *does* issue certificates of shares to a subsequent purchaser in lieu of the certificates of the prior owner, without observing its by-laws, so far as creditors of the bank are concerned a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National Banking law.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Briefs of Counsel.

Messrs. WALLACE & MASON, for the appellant:

Title to stock is determined by the transfer books of the company. Angell & Ames on Corp. sec. 113; *Long Island R. R. Co.* 19 Wend. 37; *Ex parte Holmes*, 5 Cow. 426.

Title may be without certificate. Angell & Ames on Corp. sec. 113; *Agricultural Bank v. Burr*, 24 Maine, 256; *Chester Glass Mfg. Co. v. Dewey*, 16 Mass. 94.

No person can acquire title to stock without transfer according to the rules of the bank. Angell & Ames on Corp. sec. 569; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390.

Where sale is required to be registered, the registry operates not merely to perfect a conveyance previously begun, but is itself the originating act in the change of title, and must be by assignment, either in person or by attorney, on the books of the bank. A simple credit of the amount of the shares on the treasurer's book to the successive holders, is not sufficient. Angell & Ames on Corp. sec. 576; *Marlboro Mfg. Co. v. Smith*, 2 Conn. 579.

After a person once becomes a stockholder, he can only throw off the liabilities incident to that relation by transferring the stock in accordance with the statute. *Addenly v. Storm*, 6 Hill, 624.

Transfer must be shown on the books of the bank. *First National Bank of Mendota v. Smith et al.* 65 Ill. 44.

Any mode or form of conveyance sufficient in law to transfer the title to any other property is sufficient to transfer stock, in the absence of regulation by statute or by-law, otherwise when so regulated. *The People ex rel. Pickering v. Devin et al.* 17 Ill. 84.

There is no statute in this State requiring transfer of stock on the books of the corporation.

Messrs. MONROE & BALL, for the appellee:

The liability of the shareholder in a National banking association is fixed by sec. 5151 of the Banking act. Sec.

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5234 provides the manner in which that liability is to be enforced, namely, through the receiver of the bank.

The holder of the legal title is liable primarily for all the burdens placed upon the stock. *Wheelock v. Kost*, 77 Ill. 296.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Claimant is the receiver of the Cook County National Bank, and as such filed a claim in the probate court of Cook county against the estate of Clara Irene Day Laing, deceased.

Section 5151, title 62, chap. 1, Rev. Stat. U. S. 1874, declares: "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." It is under this section of the National Banking act the liability is said to arise for the par value of the stock alleged to have been held and owned by the intestate in the "Cook County National Bank," at the time of her death. No question is made as to the liability of the estate if it shall be ascertained the intestate was a "shareholder" in the bank, in the sense that term is used in the section of the Banking act cited.

Originally, Isaac C. Day was the owner of 100 shares of the stock of the banking association, of the par value of \$10,000, evidenced by two certificates issued to him. Subsequently these certificates were returned to the bank, with a blank indorsement thereon, by persons representing themselves to be the heirs of the estate of Isaac C. Day, deceased, among whom was the intestate, Clara Irene Day, and to whom was issued a new certificate for a part of the same stock that had been owned by Isaac C. Day, viz: for thirty-three shares, of the par value of \$100 each. Other certificates were issued to the other persons representing themselves

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to be heirs, to the full amount of the remainder of the stock that had been owned by Isaac C. Day. The ledger and the stubs of the stock certificate book kept by the bank showed the issuing of the several certificates, the number of shares of stock embraced in each, the date, and to whom issued.

There is and can be no question made the intestate held a certificate for thirty-three shares of stock in the banking association, of the par value of \$100 each, at the time of her death. On notice to the administrator, he produced on the trial a certificate for that amount of shares of stock, that had been issued to her. The fact such certificate was held by her would imply an acceptance, and coming as it did from her administrator, it is not unreasonable to believe it had previously been in her possession. Holding the stock of the banking association in her own name, as the intestate did, no reason is perceived why she was not a "shareholder," within the meaning of the statute, and subject to the liabilities imposed upon "shareholders" by section 5151 of the National Banking act. The only argument made against such liability is, the stock formerly owned and held by Isaac C. Day was never transferred to the intestate "on the books of the association," as provided stock may be transferred in section 5139 of the same title and chapter of the Banking act, cited *supra*, and it is said until such transfer was so made on the "books of the association," the intestate did not "succeed to all the rights and liabilities of the prior holder of such shares." The Banking law will not bear this construction. It may be the association would not be bound to admit a purchaser of shares of stock "to all the rights and liabilities of the prior holder of such shares," unless the transfer to him was made on the books of the association in such manner as may have been prescribed in the by-laws or articles of association. But however that may be, when the association *does* issue certificates of shares of stock to a subsequent purchaser, in lieu of the certificate of the prior owner, without

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observing its by-laws in regard to transferring stock on its books, certainly, so far as creditors of the association are concerned, a party holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National Banking law. It will be noted the liability is imposed upon the "shareholder," and it is a matter of no consequence such shares may not have been transferred to such shareholder on the books of the association in *exact* conformity with its by-laws. It is sufficient, if the ownership of the shares is in fact in the person holding the certificate, to constitute him a "shareholder" in the association, and subject him to the liabilities imposed by the Banking law, under which such association may have been organized. A case in this court analogous in principle with the one at bar, is *Wheelock v. Kost et al.* 77 Ill. 296.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE FIFTH NATIONAL BANK

v.

THE VILLAGE OF HYDE PARK.

101	595
155	543

Filed at Ottawa September 26, 1881—Rehearing denied March Term, 1882.

1. TRUST—when stranger to fund is chargeable as a trustee. To charge a stranger to a trust fund as a trustee, by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was at the time aware that the debt paid by it was in fact a private debt, or such a debt that payment thereof could not lawfully be made out of such fund.

2. If a depositor pays his own debt to a banker by a check upon funds to his credit in a fiduciary capacity, the banker will be affected with knowledge of the unlawful character of the appropriation, and will be compelled to

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refund to the *cestui que trust*; but the debt paid must be such as that the officers of the bank are aware that the same is really and in truth the private debt of such depositor.

3. A treasurer of a village borrowed money of a bank on his own note, secured by valuable collaterals, professing at the time to be borrowing the same for the village to pay off its warrants in anticipation of the collection of its taxes, and such money was placed to his account in bank as treasurer, and most of it applied in payment of village warrants, and after the receipt of the taxes he gave the bank a check upon the trust fund in payment of his note, and the bank in good faith, believing the debt to have been incurred for the village, accepted the payment and surrendered the note and collaterals: *Held*, that the payment could not be rescinded by the village, and the bank be held responsible for the money so paid it.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

In April, 1873, A. D. Waldron became treasurer of the village of Hyde Park, and entered upon his duties as such. He continued to hold the office (being from time to time selected as his own successor) until May, 1878, when he was succeeded in that office by Geo. A. Follensbee. On May 20, 1873, he opened an account, in his individual name, with the Fifth National Bank of Chicago, in which account he deposited funds of the village coming to his hands as such treasurer, and so continued to do until the 11th day of June, 1877, paying dues of the village from time to time by checks on that bank, signed "A. D. Waldron," and charged against that account. On that date he closed that account, and opened a new account with the same bank in the name of "A. D. Waldron, Treasurer," by transferring the amount at that time to his credit as "A. D. Waldron," to the new account. He continued the account under the head of "A. D. Waldron, Treasurer," until May, 1878. At that time it was discovered that he was a defaulter to the village in the sum of \$114,032.62. Thereupon he was removed from office, and his successor was appointed, and the amount of the defalcation

Statement of the case.

was afterwards reduced to the sum \$76,636.13, by credits on account of property of Waldron turned over to the village on that account. Waldron, from that time to his death, appears to have been without property or assets, and wholly insolvent.

This is a suit brought in January, 1879, by the village of Hyde Park, against Waldron and the Fifth National Bank. The bill charges that Waldron misapplied a large part of the village funds in his hands, and asks an account to fix the amount, and also that the bank received a large amount of the misapplied funds under such circumstances as to render it liable as trustee in that regard; that Waldron is insolvent, and prays that the bank be required to refund to the village the funds so received, to be applied in satisfaction of Waldron's defalcation.

Pending the suit, and before final hearing, Waldron died, and as to him and his estate the suit was abated. The bank answered, a replication was filed, and the cause was finally brought to a hearing on pleadings and proofs. The circuit court found that for no part of the moneys paid by Waldron to the bank by checks on his deposit account while the account was kept in the individual name of "A. D. Waldron," could the bank equitably be charged, but that as to certain moneys of the village paid by Waldron to the bank by checks on his deposit account while the account was kept in the name of "A. D. Waldron, Treasurer," in payment of certain loans made by Waldron, and for which he had given his own promissory note, the bank was chargeable as trustee for the use of the village, and rendered a decree against the bank and in favor of the village for the sum of \$57,959.95, and interest thereon from the coming in of the answer. From this decree the bank appealed to the Appellate Court, and there the decree was affirmed. From that judgment of the Appellate Court the bank appeals to this court.

It appears from the record in this cause, that the predecessor of Waldron, as treasurer of the village of Hyde Park,

Statement of the case.

kept the moneys of the village in his hands on deposit in bank, in a deposit account in his own name. When Waldron opened his first account with the Fifth National Bank, as stated above, it was known to the bank that he was the treasurer of Hyde Park, and that the first deposit in that account was the sum of \$30,602, received by him as treasurer from his predecessor as funds of the village, and that a large part, if not all, of the moneys deposited while the account was kept in his own name, were in fact funds of the village. Waldron testifies that in this account he did not deposit or mix with funds of the village any of his own private or personal moneys, and there is no proof in the record contradicting this statement. But no proof tends to show that the bank officers knew that *all* the moneys so deposited were funds of the village. While Waldron was treasurer, while the account was kept in the name of A. D. Waldron, several loans were made from the bank, avowedly for the use of the village. Part of them were made by him in his individual name and on his personal credit, supported by personal securities and collaterals, and part of these loans were made in the name and upon the credit of the village, and one of them was made in the name of one Lawrence, and secured by Lawrence's note, signed by Waldron as security, and supported by collaterals. Of loans thus made was one on June 24, 1873, made upon a certificate given in the corporate name of the village, and signed by the president and treasurer thereof, for the sum of \$35,000; another was made on July 27, 1874, in the name of the village, on a certificate signed by appropriate officers thereof, for the sum of \$35,000. Both these loans were duly authorized by appropriate resolutions passed by the board of trustees of the village. The funds so borrowed were deposited to the credit of the account of A. D. Waldron.

During 1875 and 1876 Waldron borrowed money from this bank on several different occasions, giving his own notes for

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the same, secured by collaterals, and the sums borrowed credited to his deposit account in the bank. Some of these notes were renewed from time to time, and they were all ultimately paid by checks drawn upon his account, kept, as above stated, in his individual name. These loans, not including the renewal notes, with a like loan of \$4000, made May 17, 1877, amounted in all to about \$89,000.

On the 11th of June, 1877, Waldron made another loan from this bank, of the sum of \$52,000, and gave his own note, signed by Lawrence as security, for the sum of \$45,000, and the note of Lawrence, signed by Waldron as security, for the sum of \$7000, and both these notes were secured by collaterals then deposited by Waldron with the bank.

The proceeds of all these loans were at once passed to the credit of A. D. Waldron, in which, up to that time, all the moneys of the village coming to his hands as treasurer had been deposited.

As to each of these loans so made in the years 1875, 1876, and 1877, embracing the last loan of June 11, 1877, Mr. Lombard, the cashier of the bank, testifies that Waldron stated, at the time of making each loan, that he "wanted the money for the use of Hyde Park, to pay warrants in anticipation of the collection of taxes."

On June 11, 1877, after the proceeds of this loan of \$52,000 was passed to his credit on the books of the bank, Waldron applied to the cashier of the bank for a certificate of his balance in the bank, which was accordingly made out and presented to him, when Waldron said he wished a statement that the balance shown stood to his credit *as treasurer*. Thereupon the account was changed on the books of the bank, by closing the account as kept up to that time simply in the name of "A. D. Waldron," and opening a new account in the name of "A. D. Waldron, Treasurer," and the credit balance in the first account was transferred to the new account as a credit balance. This was done by a check signed by

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Waldron, payable to himself as treasurer, and indorsed to the bank by him as treasurer. This credit was to the amount of \$53,247.82, and to the extent of \$52,000 was composed of the money that day loaned to Waldron, upon his statement that he wanted the money for the use of Hyde Park, to pay warrants in anticipation of the collection of taxes. A written statement was then given to "Waldron, Treasurer," that the balance to credit of his account was \$53,247.82. He thereafter kept no account with this bank in the form of a private account. He afterwards made additional deposits to this new account, from time to time, until May, 1878. These deposits aggregated more than \$300,000. No loans were made to him, as treasurer or otherwise, after the deposit account to this new form. At the time when the form of the account was changed, June 11, 1877, the bank held the Lawrence note of that date for \$7000, and the Waldron note of that date for \$45,000, and also a note of Waldron, given for the sum of \$4000, of date of May 27, 1877, given for a loan made for the same avowed purposes and under like circumstances with the loan of June 11, 1877.

These loans of May and June, 1877, were afterwards paid to the bank by Waldron, by means of checks drawn by him as treasurer, and charged to the deposit account kept by him in the name of "A. D. Waldron, Treasurer." The last payment on that account was made December 1, 1877, by a check for the sum of \$50,688.88, given in payment of "balance of \$52,000, loan and interest." After the deposit of the moneys arising from this loan, and before the final payment on December 1, 1877, this deposit account had at one time been reduced, by checks drawn thereon, to the sum of \$474.17, and was again replenished on the 30th of November, 1877, by a deposit of \$97,826.31,—known to the bank officers to be the money of the village,—consisting of two checks drawn by the county treasurer, payable to "A. D. Waldron,

Brief for the Appellant.

treasurer of Hyde Park," and indorsed to the bank by him, as treasurer.

MR. LYMAN TRUMBULL, MR. CHARLES HITCHCOCK, and MR. MELVILLE W. FULLER, for the appellant:

The decree should be reversed and the bill dismissed, because the village can not keep the bonds pledged as collaterals, and at the same time recover the money paid the bank to procure their surrender.

He who seeks equity must do equity. The bank is now called upon to make restitution of money alleged to have been wrongfully paid to it by the treasurer, but without any fraud or bad faith on the part of the bank. Upon this payment it gave up most important rights of property, which the village has since acquired.

In order to hold a bank liable for paying out trust money there must be a misappropriation in fact, and participation in, or privity with, such breach of trust on the part of the bank.

All the cases show that without pre-concert and knowledge of the breach of trust a bank can not be held liable. There must be proof, as Lord CAIRNS says in *Gray v. Johnston*, 3 Eng. & Irish Appeals, p. 11, that "the bankers are privy to the intent to make this misapplication of the trust funds."

The liability, in *Bodenham v. Hoskyns*, 13 Eng. L. & Eq. 222, (21 L. J. N. S. 864,) much relied on by appellee's counsel, was declared to be founded on the actual knowledge of, and participation in, the misapplication.

A *cestui que trust* can not stand by and permit the trustee to borrow money upon the representation that it is for the benefit of the *cestui que trust*, and then repudiate the action of the trustee in paying the loan. Still less can a *cestui que trust* recover back from a creditor money paid him to take up a loan, which the creditor made in the belief to the knowledge of the *cestui que trust* that it was for the benefit of, and assented to by, the latter.

Brief for the Appellee.

MESSRS. LEAMING & THOMPSON, Mr. CHARLES H. WOOD, and Mr. L. D. CONDEE, for the appellee:

1. A trust will be enforced not only against a rightful possessor of trust property as trustee, but against all persons coming into possession of such property with notice of the trust. *In re Gross*, 6 Law Rep. C. 632; *Bodenham v. Hoskyns*, 13 Eng. L. & E. 222; *Morse on Banks and Banking*, pp. 37, 45, (2d ed.); 2 Story's Eq. Jur. sec. 1707, and note a; *Perry on Trusts*, sec. 840.

2. If trust property be commingled by the trustee with his own property, it does not thereby, in the view of equity, lose its character, but remains the property of the *cestui que trust*. *Van Allen v. American National Bank*, 52 N. Y. 1; *Bodenham v. Hoskyns*, 13 Eng. L. & E. 222; *Same*, 21 id. 645; *Morse on Banks and Banking*, (2d ed.) p. 49; *Pennell v. Deffell*, 4 De Gex, Mc. & G. 382.

3. If a party dealing with a trustee has, at the time, reasonable grounds for believing that he intends to misapply trust property, or is in the very transaction applying it to his own private use, a court of chancery will hold the person so dealing responsible for any injury sustained by the *cestui que trust*. *Field v. Schieffelin*, 7 Johns. Ch. 150; *Jandon v. National City Bank*, 8 Blatch. 430; *Pannell v. Hurley et al.* 2 Collier, 244.

4. A person fraudulently receiving or possessing himself of trust property, is converted by a court of chancery into a trustee for parties beneficially interested in such property, and the same rights and remedies exist against him as against an express trustee fraudulently committing a breach of trust. *Norton et al. v. Hixon*, 25 Ill. 439; *Bank of Greensboro v. Clapp*, 76 N. C. 482; *Jackson et al. v. Norris et al.* 72 Ill. 367; *Bridgeman v. Gill*, 24 Beav. 302; *Shaw v. Spencer*, 100 Mass. 382.

5. The appropriation or application of public funds in payment of private indebtedness is not within the scope of

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the powers conferred upon the corporate authorities of municipal corporations, and no consent can be presumed on the part of such authorities to an act *ultra vires*. *Jackson ex rel. v. Norris et al.* 72 Ill. 364; *Bradley v. Ballard*, 55 id. 413; *Taylor v. People*, 66 id. 326.

Mr. JUSTICE DICKEY delivered the opinion of the Court:

It is conceded that no one had the slightest suspicion that Waldron was a defaulter, until some time in 1878, and about the first of May of that year. There is nothing in the proofs tending to show that any of the officers of the bank had any suspicion that Waldron was, or had at any time been, applying the moneys of the village to the payment of any claim or demand which (as between him and the village) he was in duty bound to pay from his own personal funds.

It is insisted by counsel for the village of Hyde Park, that the several loans made of this bank by Waldron in his own name, and upon his own notes or the notes of other private persons, were mere *private debts*, and not debts for which the village was liable, and inasmuch as the bank officers knew that the payment of these loans was made from funds known by them to be the funds of the village, they insist that such payment was known to them to be a misappropriation of the trust funds. The learned judge of the circuit court took this view of the matter, in so far as concerns payments made after the account was kept in the name of "A. D. Waldron, Treasurer." He held otherwise, however, so far as regards payments made out of the account kept in the name of "A. D. Waldron." In *Morse on Banks and Banking*, 37, it is said, in general terms: "If a depositor seeks to pay *his own debt to the banker* by an appropriation of the funds to his credit in a fiduciary capacity, then the banker is affected with knowledge of the *unlawful character* of the appropriation, and will be compelled to refund." It seems plain, however, that unless the debt to which the funds are thus applied

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be such that the officers of the bank are aware that the same is really and in truth "*his own debt*," knowledge of the unlawful character of the appropriation can not be imputed to the bank.

To charge a stranger to a trust fund as a trustee, by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt to the payment of which it was applied, was, at the time of such application, in fact a private debt,—a debt of such character that the fund in question could not lawfully be applied in payment thereof.

In *Keame et al. v. Robarts et al.* 4 Maddox Ch. 357, it is well stated, as the result of the authorities at that time (1819), that "every person who acquires personal assets by a breach of trust * * * is responsible to those who are entitled to the fund, if he is *a party* to the breach of trust." And again: "Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is *prima facie* inconsistent with the duty of an executor." This implies that the debt in satisfaction of which the property is taken, is of such character that it is known to be a private debt, for it is elsewhere declared that the party so receiving the trust fund must, to become chargeable, have been guilty of "fraud, collusion, or gross negligence." In the same case the vice-chancellor says: "If a party dealing with an executor for the personal assets, pays his money to the executor so that it *may* be applied to the purposes of the will, he is not responsible for the executor's misapplication of it; but if, in dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally

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a party to the breach of trust whether he applies his money to the private debt of the executor, or to the private trade of the executor, and this because he knows that the object to which the money is applied is not an object to which it may be lawfully applied."

In *Field v. Schieffelin*, 7 Johns. Ch. 150, Chancellor KENT says, in substance, that to charge a third party with participation in the misapplication of trust funds by a trustee, the proof must "justify the conclusion of a breach of trust, in which the party to be charged *knowingly* partook." That was the case of a guardian, and Kent, after a review of all the then cases, says they all agree that a party dealing with an executor is safe if he is no party to his fraud, and has no knowledge or proof that he intended to misapply the proceeds, and was not in fact by the very transaction applying them to the extinguishment of *his own* private debt. This necessarily refers to a debt known to be *his own* debt, to which the fund could not be properly applied.

We have examined with care all the cases referred to by counsel for appellee, and many others, where a party receiving trust funds in payment of a private debt to himself has been held chargeable as a trustee, and we find no case among them where the party so charged was not aware, at the time of receiving such trust funds, that the debt to which it was applied was a debt to the payment of which the trustee *could not* lawfully apply the trust fund. The receipt of such money, under such circumstances, is a plain fraud.

Let us consider a moment the character of these debts, which in this case are called private debts. The debt for the loan of \$52,000, made on June 11, 1877, may be taken as an example. Waldron called at the bank, saying he wished to borrow a given sum of money for the use of the village of which he was treasurer, to pay warrants in anticipation of the collection of taxes. The money was, upon that statement, lent to him upon his own personal note, secured by collater-

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als. There was no fraud in believing this statement to be true, nor is there any proof that it was not true. The money thus lent was placed to his credit as treasurer, and paid out by him on checks drawn by him as treasurer, a large portion of which is proven to have been paid upon proper warrants upon the treasury, and no part of which is shown to have been paid out for other purposes. The bank assumed, and had a right to assume, that this money was intended to be applied to the proper payment of valid warrants, in anticipation of the collection of taxes, and on the 1st of December, 1877, one day after a large amount of money had come into the treasury from the collection of taxes by the county treasurer, when Waldron proposed to use so much of that fund in paying off the unpaid balance of that loan, the officers of the bank were authorized to assume, and in good faith did assume, that the money was by such payment being applied in refunding money paid out on such warrants on the treasury from the proceeds of the original loan. If this were true in fact, it was not a misapplication of the trust fund, but was a proper and just application of the fund. Had Waldron had abundant means of his own, and had he, when there was no money in the treasury, paid with his own money warrants properly drawn upon the treasury to the amount of \$50,000, he would have thereby in equity become entitled (by subrogation to the rights of the holders of such warrants) to apply to his own use so much of the public moneys afterwards coming to his hands as needed to refund to him the amounts so advanced.

It follows that, under the circumstances, at the time when the officers of this bank received payment of this loan, they were not aware that, as between the village of Hyde Park and Waldron, he had not lawfully and equitably the right to apply the public funds to the payment of this debt. They must be assumed to have known the law in relation to the transaction, but the law does not impute to them omniscience

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as to the facts. Taking the facts as these officers believed they were, and as they had good cause to believe, the payment would not have been a misappropriation of the funds. They are not chargeable with fraud, collusion, or gross negligence.

The case *In re Gross*, 6 L. R. 632, C. App., is cited as against this position, but it is not in point. There, as here, the funds were known to be trust funds. There, as here, the funds may be said to have arisen from moneys advanced by the bank upon the personal credit of the officer and trustee, but at the time when it was proposed by the bank to apply the trust fund to the private account of the officer, it was known that the officer was in default, and had the officer been present and offered to so apply the trust fund, called the "police fund," the bank could not at that time have accepted the same without being knowingly a party to the misapplication. The court said: "If a banker receives from a customer holding a trust account, a check drawn on that account, he is not in general bound to inquire whether that check is properly drawn. Here the customer has drawn no check, and the bankers seek to set off the balance of his private account against his credit on what they knew to be a trust account." It was very properly held that the set-off could not be allowed. The court would otherwise have permitted the bank to make a known misapplication of a trust fund.

So, in *Bodenham v. Hoskyns*, 13 E. L. & E. 222, Parks was the agent of Bodenham, and kept the moneys of his principal in the bank of Hoskyns, in a deposit account headed "Rotherwas account," and at the same time kept his own moneys in the same bank in a deposit account in his own name. After Parks was known to the banker to be insolvent, and when his private account was largely overdrawn, the bank, with the consent of Parks, transferred all the moneys standing to his credit on the "Rotherwas account" to his

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credit on his private account, which still left that account over-drawn. The bank was very properly held to be a party to that breach of trust. The officers of the bank knew, at the time of the appropriation of the trust funds, that they were the funds of another entrusted to the care of their debtor, and that the debt to which they were applied was a strictly private debt, to which the trust funds could not properly be applied. The court says: "They were aware of the circumstances, which made it a fraud in Parks to make the transfer, * * * and they concur in the transaction." In the case at bar the officers had no knowledge or suspicion of the circumstances which made it a fraud in Waldron to pay these notes from the village funds.

In *Jandon v. City Bank et al.* 8 Blatch. 480, the trustee borrowed money from the bank for *his own use*, and pledged certificates of stock issued to him, as trustee for complainant, by name; and it was ruled that the bank held them for the complainant, the court saying: "The transaction of the loan indicated * * * that he was borrowing money for *his private use*." In the case at bar the transaction of the loan did not indicate that he was borrowing the money for his own use. He professed to be borrowing for the use of Hyde Park, to pay warrants in anticipation of the collection of taxes.

It does not seem necessary to review other cases in detail. The teaching of all the authorities is consonant with the proposition that to charge a stranger as a party to the misappropriation of a trust fund, such stranger must knowingly partake in the breach of trust,—that he must know or have proof of facts which in law characterise the transaction as a breach of trust.

• It is no doubt true that where a stranger receives moneys of a trust fund from the trustee as a gift, or without a valuable consideration, though in ignorance of the character of the moneys received, he may be held as a trustee; but

Syllabus.

where such stranger to the trust has in good faith paid a valuable consideration, or has materially changed his condition, so that he can not be restored to his original advantages, that doctrine does not apply. In the case at bar the money was in good faith received by the bank from a man in good credit, and with assets in his hands of his own to the value of over \$30,000, and his note and valuable collaterals were surrendered to him. It is now proposed, after that man has become insolvent, and has been stripped by complainant of all his assets, and has died, to rescind the payment to the bank, without restoring that for which it was paid. This, it seems to us, would be grossly unjust.

The judgment of the Appellate Court is therefore reversed, that the Appellate Court may reverse the decree and remand the cause to the circuit court, for proceedings not incompatible with the views of the law herein expressed.

Judgment reversed.

SCOTT and SHELDON, JJ., dissenting.

CITY OF PEORIA

v.

JACOB DARST *et al.*

Filed at Ottawa January 18, 1882—Rehearing denied March Term, 1882.

1. CONSTRUCTION of deeds and wills—*intention must control.* It is a rule in construing deeds or wills, that the intention of the grantor or testator, as manifested by the words of the writings, in connection with the surrounding circumstances, must be carried into effect, if no rule of law will thereby be violated, or sound public policy be disturbed. In ascertaining such intention one clause or part is not to be viewed but in connection with all the other parts.

2. SAME—*character of estate created by deed—as to inheritance from grantee.* A father of two illegitimate children conveyed real estate to their
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mother for her life, with remainder in fee to such children, or the survivor of them, who might survive their mother or leave issue, and in the *habendum* clause of the deed provided that if such children should survive their mother, and die without making any disposition of the property, by will or otherwise, and without issue, then it should go to the city of Peoria, etc.: *Held*, that the intent was, that in case of the survivorship of the children they should take and enjoy the property devised to their use *personally*, and have the full benefit of it, even to the extent of selling or devising it in fee; but in case of their death without issue, or disposition of it by them, no such estate had vested in them as could pass by *descent* to any one.

3. **REMAINDER—vested and contingent—defined.** A contingent remainder is one, the vesting or taking effect of which in interest is, by the terms of its creation, made to depend upon some contingency which may never happen; while a vested remainder is one that takes effect immediately upon the making of the instrument creating it, though its enjoyment is postponed until the termination of the prior estate.

4. **SAME—a deed construed—whether a vested or contingent remainder.** Where the father of two illegitimate children conveyed real estate to their mother for the term of her natural life, with remainder to his two children in fee simple, as joint tenants,—that is to say, the mother to have a life estate in the property, and at her death the fee simple to vest in the children, or in the survivor of them, with this further clause immediately following: "If, however, both of them should die before the termination of the C. estate," (that being the life estate of the mother,) "and to leave no child or children, then at the death of the said C. the title is to vest in the city of Peoria for the benefit of orphan children," etc., it was *held*, the grant to the children was not of a vested remainder, but that they took a contingent right only, depending upon the event of both or one of them surviving the mother or having issue, and they both having died in the lifetime of the mother, leaving no issue, that the title, on the death of the mother, vested in the city of Peoria.

5. **ESTATE—application of the rule as to limiting a remainder in fee after a prior one.** Where two limitations over in fee to one and to another, are concurrent contingent remainders, limited alternately on the same event to take effect, not the one subsequent to the other in succession, but the one as a substitute for the other, this will not be the limitation of a fee after a fee, and is permissible.

6. Where both limitations are to take effect, the latter can do so only as an executory devise, for a remainder originally contingent, but afterwards vested by the happening of the contingency, is essentially the same as if it had been vested at its origin; but where both are limited alternately on the same event, by the happening of which one is to vest in exclusion of the other, then both are contingent remainders, and if such event never happens, the second remainder will take effect.

Statement of the case.

APPEAL from the Circuit Court of Peoria county; the Hon. JOHN BURNS, Judge, presiding.

This was a proceeding, by petition of Jacob Darst, for the partition of certain real estate in the city of Peoria. The property originally belonged to George Morton, through whom all the parties to the record claim, and the controversy in the case turns upon the construction to be given to a deed executed by him of the premises in 1852. The deed is as follows:

"This deed, made and entered into this 12th day of August, in the year of our Lord 1852, by and between George Morton, of the city of St. Louis, county of St. Louis, and State of Missouri, party of the first part, Mary M. Clark, of the city of Peoria and State of Illinois, party of the second part, George Douglass Morton and Mary Helen Morton, both of the city of Peoria and State of Illinois, parties of the third part:

"Witnesseth, that the said party of the first part, for and in consideration of the sum of \$3000 to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained and sold, conveyed and confirmed, unto the said party of the second part, the following lots of ground in block numbered 85, of the city of Peoria, being lots numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, being the whole of said block 85, situated in Morton, Voris & Larveille's addition to the town of Peoria. To have and to hold, unto the said Mary M. Clark, for and during her natural life, remainder to George Douglass Morton and Mary Helen Morton in fee simple, as joint tenants,—that is, the said Mary M. Clark to have a life estate in said property, and at her death the fee simple title to the property to vest in George D. and Mary Helen Morton, or in the survivor of them. If, however, both of them should die before the termination of Mary M. Clark's estate, and to leave no child or children, then, at the death of said Mary M. Clark,

Statement of the case.

the title is to vest in the said city of Peoria for the benefit of orphan children, to be used for said purpose as the authorities of said city may think most expedient. If the said George D. Morton and Mary Helen Morton, or either of them, should survive the said Mary M. Clark, and should die without making any disposition of the property, by will or otherwise, it is in that event to go to the said city of Peoria for the benefit of orphan children, as aforesaid. The said George D. Morton was born in the city of St. Louis on the 18th day of July, 1850, and the said Mary Helen Morton was born in the city of St. Louis on the — day of —, 1852. And the said party of the first part hereby covenants that his heirs, executors and administrators will warrant and defend the title to the said premises, and every part thereof, to them, the said parties of the third part, and to their heirs and assigns forever, against the lawful claim or claims of all and every person or persons whomsoever claiming or to claim the same, or any part thereof.

"In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first herein written.

"Signed in presence of Lawrence T. Poland.

GEORGE MORTON. [Seal.]"

At the time of the making of the deed Mary M. Clark was a widow with four children, Frank Clark, Benjamin Clark, George Douglass Morton, and Mary Helen Morton. The two latter were the illegitimate children of George Morton, the grantor in the deed, and both died in 1855 or 1856, the said Mary Helen first, and George Douglass a few hours later on the same day, leaving surviving them, as their only heirs, their mother, Mary M. Clark, and their half-brothers, Benjamin and Frank Clark. On August 23, 1858, Mary M. Clark conveyed to the city of Peoria all her title and interest in the premises, and soon thereafter the city entered into possession of the same, and made valuable improvements, and

Brief for the Appellant.

have continued to use and occupy them up to the time of the commencement of this suit. On October 3, 1861, Frank Clark conveyed to the petitioner, Jacob Darst, all his title and interest in the premises. Mary M. Clark is now dead, having died some time in 1865.

Upon this state of facts the circuit court found that Darst and Benjamin Clark were respectively owners in fee of one-fourth of the premises, and that the city of Peoria was the owner of one-half, and decreed accordingly. The city appealed.

Messrs. COOPER & TENNERY, for the appellant:

The rules of construction require that all the language of the grant shall be considered, and effect given to it, unless so repugnant or meaningless that it can not be done. *Cooper v. Cooper*, 76 Ill. 60; *Brownfield v. Wilson*, 78 id. 467.

In construing deeds or wills the intention of the grantor or testator, as manifested by the words of the writing, in connection with surrounding circumstances, must be carried into effect. *Pool v. Blakie*, 53 Ill. 495.

As to the distinction between vested and contingent remainders, the following authorities were cited: 2 Blackstone's Com. 168, 170; 2 Washburn on Real Prop. 224, 228, 240.

The office of the *habendum* in a deed is not to grant any estate in the first instance, but merely to limit or define the extent or certainty of an estate previously granted. *Frink v. Darst*, 14 Ill. 304; *Cooper v. Cooper*, 76 id. 57.

The grant is to the mother for life, and at her death to the two children, or the survivor of them, and in case both of them shall die childless before their mother, then at the death of the mother the title to vest in the city of Peoria, etc. And not only so, but if the two children, or either of them, should survive the mother, and should die without making any disposition of the property, by will or otherwise, it should go to the city of Peoria. This clearly expressed intent should be carried out by the courts.

Brief for the Appellee.

The terms employed to designate those who are next to take after them exclude the idea of inheritance. These terms are "child or children," which are words of purchase, in contradistinction to the term "heir," which is held to be a word of limitation. *Baker v. Scott*, 62 Ill. 86; *Beacroft v. Strawn*, 67 id. 28; *Butler v. Huestis*, 68 id. 594.

But admitting that an estate in fee did in the first instance vest in the two children as grantees in the deed, we insist such estate was not absolute in its character, but subject to be afterwards divested upon a contingency, which in fact has occurred. *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315.

Mr. H. W. WELLS, for the appellee:

The deed conveyed a remainder in fee, which vested upon its delivery. An estate in remainder vests at the earliest possible moment. For example: "I give and devise to A, etc., for life, and upon his death, to B." The remainder vests at once. *Doe v. Considine*, 6 Wall. 474; *Manderson v. Lukins*, 23 Pa. St. 31; *Williams on Real Prop.* 242; 4 Kent's Com. 203; 1 Cruise's Digest, 237.

A conveyance to A for life, remainder in fee to B. Here B takes a remainder which vests upon the delivery of the deed to A. *Ide v. Ide*, 5 Mass. 500; *Burbank v. Whitney*, 24 Pick. 146; *Wimple v. Fonda*, 2 Johns. 288; *Hall v. Tuffs*, 28 Pick. 455.

A vested remainder is where a present interest passes to a definite person *in esse*, to be enjoyed *in futuro*. *Preston on Estates*, 70; 2 Washburn on Real Prop. (4th ed.) p. 542.

No degree of uncertainty as to the remainder-man ever enjoying the possession of the estate can defeat it, provided he has the present absolute right to the estate the instant the prior estate is determined. 2 Washburn on Real Prop. (4th ed.) p. 547; *Pierce v. Savage*, 45 Me. 90; *Coxall v. Sherrard*, 5 Wall. 269; *Brown et al. v. Laurence et al.* 3 Cush. 390.

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A remainder is never contingent where it can be construed to be vested. 2 Washburn on Real Prop. (4th ed.) p. 542; *Manderson v. Lukins*, 23 Pa. St. 31; *Leslie v. Marshall*, 31 Barb. 566; *Blanchard v. Brooks*, 12 Pick. 47; *Coxall v. Sherard*, 5 Wall. 289.

If the deed passed a vested remainder in fee simple, it was not competent for the grantor to divest that estate, nor to change the law of descent by any subsequent clause in the deed. *Riggin v. Love*, 72 Ill. 553; *Siegwald v. Siegwald*, 37 id. 437; *Proprietors Church & Co. v. Grant*, 3 Gray, 142; *McLean v. McDonald*, 2 Barb. 535.

No remainder can be limited after a fee. *Blanchard v. Brooks*, 12 Pick. 46; *Bouvier's Inst.* 249, 288.

The rules governing the construction of wills and deeds are entirely different. A will is presumed to be made in extremity, and without the aid of counsel, (*Bouvier's Inst.* vol. 2, p. 293, *Cruise's Digest*, vol. 3, p. 444,) while a deed is presumed to be made upon the advice and with the assistance of counsel. 4 *Kent's Com.* 264, 501; *Siegwald v. Siegwald*, 37 Ill. 430; *Butler v. Huestis*, 68 id. 594; *Brownfield v. Wilson*, 78 id. 467.

MR. JUSTICE SHELDON delivered the opinion of the Court:

The city of Peoria claims the exclusive title to the land in question, under the deed of George Morton. There can be no doubt as to the intention of the maker of that deed. It was as clear as can be expressed by language, that on the contingency which has here happened,—the death of Mary Helen Morton and George Douglass Morton, childless, in the lifetime of Mary M. Clark,—the property, on the death of the latter, should go to the city of Peoria for the benefit of orphan children. The express words of the deed are, that if both the said Mary Helen and George Douglass should die before the termination of Mary M. Clark's life estate, and leave no child or children, then, at the death of said Mary

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M. Clark, the title should vest in the city of Peoria for the benefit of orphan children. The said Mary Helen and George Douglass both did die childless, in the lifetime of Mary M. Clark. Why, then, at her death should not the title vest in the city of Peoria, as the deed intended and expressly declared it should?

"The law," says Mr. Powell, in his notes to Wood's Conveyancing, as quoted in 3 Washburn on Real Prop. 621, marginal, "is curious, and almost subtilizes to devise reasons and means to make assurances and deeds inure according to the just intent of parties, and to avoid wrong and injury which, by abiding by rigid rules, may be wrought out of innocent acts."

This court said, in *Pool v. Blakie*, 53 Ill. 502: "It is a rule in construing deeds or wills, that the intention of the grantor or testator, as manifested by the words of the writings, in connection with surrounding circumstances, must be carried into effect." It is certainly so when, as afterward said in that case, no rule of law will be violated, or sound public policy disturbed.

As the reason why the intention of the grantor here should not be allowed to prevail, and must be defeated, appellee's counsel asserts that the deed conveys an absolute remainder in fee simple to George Douglass and Mary Helen Morton, which vested in them upon the instant of the delivery of the deed in 1852, and that the subsequent limitation to the city of Peoria was an attempt to limit a fee upon a fee, and was inoperative and void by the rule of the ancient common law, which did not permit any limitation of an estate over after the grant of a previous fee. But is it not an unwarrantable assumption that there is here a limitation, in the first place, of a remainder in fee to the children, absolutely and unconditionally? Some ground for it may be found if we read the first branch of the *habendum* clause of the deed by itself, disconnected from what follows. But such a mode of constru-

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ing an instrument is not admissible. One part is not to be viewed by itself, but in connection with other parts, and the meaning of a deed is what it is found to be from taking and considering all of its parts together, and not from what any single clause by itself may show. And of especial force is this rule here, where the first branch of this *habendum* clause has immediately following it the words, "if, however." These are qualifying words,—words of condition,—denoting that what precedes is not the precise grant, and that what follows must be read to see what the exact grant is. The first clause says, at the death of the mother the fee simple title to the property is to vest in the children, or the survivor of them. "If, however," immediately following in the next clause, "both of them should die before the termination of Mary M. Clark's estate, and to leave no child or children, then, at the death of said Mary M. Clark, the title is to vest in the city of Peoria for the benefit of orphan children."

Connected together, then, as these first and second branches of the *habendum* clause are by the qualifying conditional words above, the first alone does not show what estate is granted to the children, but both must be taken together as showing it; and reading both clauses together, we find that it is not a fixed right of future enjoyment after the death of the mother which is granted to the children, but a contingent one only, dependent upon the event of both or one of them surviving the mother, or having issue. In case of such surviving or having issue, then the fee simple title, at the death of the mother, is to vest in the children, or the survivor; but in the contrary event, the title is to vest in the city of Peoria. The two clauses being separated only by a punctuating point, and no regard being had to punctuation in construing a deed, they are really but one clause,—one entire expression how the property should go. It was an uncertain event whether or no the children, or either of them, would survive the mother or leave issue, and so whether the remainder to them would

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ever take effect. The estate thus limited comes within the proper definition of a contingent remainder, as being "one whose vesting or taking effect in interest is, by the terms of its creation, made to depend upon some contingency which may never happen at all." (2 Washburn on Real Property, 519.) And even the first clause of the *habendum* names the death of Mary M. Clark as the time for the title to vest in George D. and Mary Helen Morton.

We find, then, upon construction of the two clauses which give the remainder, taken together, and not looking to the first one singly, that the limitation of estate over to George D. and Mary Helen Morton was not an immediate vested interest in remainder, which they took on the making of the deed, but that it was a contingent remainder, depending upon a contingency which might not, and in fact did not, happen, whether it ever should take effect.

We may here advert to the third branch of the *habendum* clause, (which perhaps might more properly have been done in another connection when speaking of the intention,—making provision in case the remainder shall take effect in favor of the children,) which provides, that if the children, or either of them, should survive the mother, and should die without making any disposition of the property, it should then go to the city of Peoria. This is a further manifestation of the purpose of the grantor to restrict the grant of the property, after the termination of the life estate in Mary M. Clark, to the use *personally* of these two children and the survivor of them, or any child of either, so that no estate should vest in George D. and Mary Helen Morton which could pass by *descent* to any one. They being the illegitimate children of the grantor by Mary M. Clark, he gives to her by the deed a life estate in the premises in question, and intends that at her death these children, if they or either of them live to take and enjoy it, shall do so, and have the full benefit of it, even to the extent of selling or devising it in

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fee; but if they, or either of them, do not so live to take, and die without issue of their own, then his purpose, as to be derived from the deed, is, rather than that the property should pass *by descent* to the heirs-at-law of these children, of no kin to himself, that it should go to the city of Peoria for the benefit of orphan children; and so the deed by express appointment fixes the time when the remainder to the children shall vest, to be at the termination of the life estate. And the question, as before observed, is, whether the deed may not be so construed as to effectuate the intention of the grantor, or are we forced to adopt a construction which will thwart it.

The remainder to these children being a contingent remainder, the limitation of estate over to the city of Peoria does not come within the prohibition of the rule that no remainder can be limited after a remainder in fee. The two limitations of estate over to the children and to the city of Peoria are concurrent contingent remainders in fee, limited alternately on the same event to take effect,—not the one subsequent to the other, in succession, but as a substitute for the other. This is not a limitation of a fee after a fee, and is permissible.

Mr. Washburn, in his treatise on Real Property, says: "Notwithstanding a remainder limited after a remainder in fee would be void, as has been often repeated, yet two remainders may be so limited, though each a fee, as to be good, provided this is so done that only one is to take effect, the one being a substitute for and not subsequent to the other. The consequence is, that if the first takes effect and becomes vested, the other at once becomes void. Such limitation is said to be of a *fee with a double aspect*. A case illustrative of this proposition is that of *Luddington v. Kime*, 1 Lord Raymond, 203, where the devise was to A for life, and if he had male issue, then to such issue and his heirs; but if A died without issue male, then to T. B. in fee. Here are two remain-

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ders contingent in their character, and both in fee, dependent upon the same particular estate, and to take effect, if at all, upon the determination of that estate, and only one of these can take effect. If A has issue, the remainder vests at once in such issue, and defeats the limitation to T. B. altogether. On the other hand, if A dies without issue, T. B.'s remainder at once vests in him, and takes effect as a substitute for the other,—neither is, by its terms, to wait until the other shall have once taken effect and afterwards been determined." 2 Washburn on Real Prop. 250, marg. The author cites several other authorities in support of the text, among them *Dunwoodie v. Reed*, 3 Serg. & R. 452. In that case the testator devised to his daughter, Jane Dunwoodie, during her natural life, and at her decease unto her male heir, John Dunwoodie, if alive at her death, otherwise unto her next male heir, and it was held Jane Dunwoodie took an estate for life, with concurrent contingent remainders to John Dunwoodie, or such person as, in the event of his death in the lifetime of Jane Dunwoodie, should be her heir male. It was there said, by TILGHMAN, Ch. J.: "The will presents a contingency with a double aspect, to be determined immediately on the death of Jane Dunwoodie. At that moment an estate in fee was to vest in somebody,—in John Dunwoodie, if living; but if not, in the next heir male of Jane; but in whomsoever it vested, it was *indefeasible*. There was no limitation, therefore, of a fee after a fee, but a limitation of only one indefeasible estate in fee." And, further, by GIBSON, J.: "But two or more several contingent remainders in fee may be limited, the one to be *substituted* for the other, instead of being dependent and to take effect in succession."

From all the cases the rule seems to be this: Where *both* limitations are to take effect, the latter can do so only as an executory devise, for a remainder originally contingent, but afterwards vested by the happening of the contingency, is essentially the same as if it had been vested at its origin;

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but where both are limited alternately on the same event, by the happening of which one is to vest in exclusion of the other, then both are contingent remainders.

Our conclusion is, that the limitation over to the city of Peoria was not void as being the limitation of a fee after a fee,—that the contingency upon which George D. and Mary Helen Morton were to take never happened, and so no interest ever vested in them, and hence that the city of Peoria took and now hold, under the deed, the whole title.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

Mr. CHIEF JUSTICE CRAIG, and Mr. JUSTICE MULKEY, dissent.

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29a	516

J. YOUNG SCAMMON

v.

THE GERMANIA INSURANCE COMPANY.

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

1. **INSURANCE**—*policy construed as to time of furnishing proofs of loss.* Where an insurance policy provides, that "in case of loss assured shall forthwith give notice of said loss, * * * and as soon after as possible render a particular account of such loss," the words "*forthwith*," and "*as soon as possible*," will be construed to mean within "a reasonable time," "without unreasonable delay," and are the equivalent of "due diligence."

2. **SAME**—*delay to furnish proofs, when unreasonable.* A policy of insurance required that notice of a loss should be given forthwith, and proofs of the particulars of the loss rendered as soon thereafter as possible, and payment was not to be made until sixty days after such proof. No attempt was made to furnish the company such proofs for more than nine months after a loss, and no excuse was shown for the delay: *Held*, that the delay was unreasonable, and that no recovery could be had on the policy.

Brief for the Appellant.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. T. A. MORAN, Judge, presiding.

MR. FRANCIS H. KALES, for the appellant:

The notice of loss in this case was served in apt time. *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70; *Palmer v. Insurance Co.* 44 Wis. 201; *Simpson v. Henderson*, 22 Eng. C. L. 313.

The cases cited are express authority that the word "forthwith" is not to be taken literally, but is to be construed to mean within a reasonable time.

The proofs of loss, in view of the provisions of the policy, were made in good time. The words "as soon as possible," mean within a reasonable time, under all the circumstances. See cases cited above, and *Eastern R. R. Co. v. Relief, etc. Ins. Co.* 105 Mass. 570.

The peculiar insurance contract in this case, if strictly construed, gave to the plaintiff a reasonable time, before the expiration of ten months after the loss, provided there was early and timely notice of the loss. Such contracts being unipartite or unilateral, and filled with conditions inserted by persons skilled in the learning of insurance law, are to be liberally construed for the insured, and strictly as to the insurance company. *Insurance Co. v. Wilkinson*, 13 Wall. 233; *Aurora Ins. Co. v. Eddy*, 49 Ill. 106; Wood on Insurance, 140, 141, and cases there cited; Bliss on Life Insurance, 656.

The loss is not, by the terms of the policy, to be payable until the expiration of sixty days from the time of furnishing such proofs. The plaintiff is to have one year from the time of the loss within which to bring his suit,—to avail himself of which, and yet give the insurer sixty days before suit brought, the proofs under the policy must be furnished to the company within ten months from the time of the loss. This

Brief for the Appellee.

construction can stand, if the words "as soon after as possible," or "forthwith," are held to mean a reasonable time; and, perhaps, in this case, where the consequences of delay in furnishing proofs of loss are expressly stated, to-wit: "that the loss shall not be payable until they are furnished, the construction here suggested would stand, even if these expressions were taken literally.

Mr. LAWRENCE PROUDFOOT, for the appellee:

All of the adjudicated cases, without a single exception, hold that strict compliance with the provisions of the policy in regard to the serving of notice and the proofs of loss is a condition precedent, and that no action can be maintained unless this condition has been performed. *Edgley v. Farmers' Fire Ins. Co.* 43 Iowa, 587; *Blossom v. Lycoming Fire Ins. Co.* 64 N. Y. 162; *Wood v. Worsley*, 6 Term Rep. 710; *Inman v. Western Fire Ins. Co.* 12 Wend. 452.

The word "forthwith" means without unnecessary delay. *May on Insurance*, sec. 462; *Peoria Marine and Fire Ins. Co. v. Lewis et al.* 18 Ill. 560; *Cornell v. LeRoy*, 9 Wend. 166; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 289; *Inman v. Western Fire Ins. Co.* 12 Wend. 452; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 389; *May on Insurance*, sec. 464.

That the delay in furnishing proof of the loss is fatal to a recovery, see *Sherwood v. Agricultural Ins. Co.* 10 Hun, (17 N. Y.) 593; *Bell v. Lycoming Fire Ins. Co.* 19 Hun, 239; *Blossom v. Lycoming Fire Ins. Co.* 64 N. Y. 162; *Miller v. Hamilton Ins. Co.* 17 id. 609; *Inman v. Western Ins. Co.* 12 Wend. 452; *Kimball et al. v. Howard Ins. Co.* 8 Gray, 33; *Wheeler v. Field*, 6 Mete. 295; *Prescott Bank v. Coverly*, 7 Gray, 221; *Trask v. State Fire and Marine Ins. Co.* 29 Pa. St. 198.

The law is well settled, that though the company may know of the loss, it does not excuse the giving of notice and proofs of loss, and that the conditions must be strictly com-

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plied with, unless waived. *Edwards v. Lycoming Fire Ins. Co.* 75 Pa. St. 378; *Patrick v. Farmers' Ins. Co.* 43 N. H. 621; *Beatty v. Lycoming Fire Ins. Co.* 66 Pa. 9.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This action was brought on a policy of insurance issued by the Germania Fire Insurance Company to J. Young Scammon. The property covered by the policy was totally destroyed by fire on the 14th day of July, 1874. Notice of the loss was served on the local agent of the company on the 5th of August next thereafter, and by him transmitted to the office of the company, located in the city of New York. "Proofs of loss" were delivered to the local agent at Chicago on the 23d day of April, 1875, and the same were by him transmitted to the general agent of the company at New York. It is not proven the "proofs of loss" reached the principal office of the company before the 10th of May, 1875. Under the date of the 12th of May, 1875, the general agent acknowledged the receipt at his office of the "proofs of loss," and notified the assured "they were furnished too late." In case of loss, assured was obligated by a clause in the policy to "forthwith give notice of said loss to the companies, through their general agent in the city of New York, and as soon after as possible render a particular account of such loss." The defence in the court below was placed mainly on the ground there had been no compliance by the assured with this clause of the policy. As respects the "notice of loss," whether it was given in apt time or not need not be considered, as there is another objection insisted upon that is fatal to any recovery in the present case.

When "proofs of loss," which the assured was obligated to furnish, were delivered to the agent of the companies in New York, objection was promptly made, and the assured notified "they were furnished too late." That raises the distinct question whether the proofs of loss in this case were fur-

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nished in time by assured to constitute a compliance with his insurance contract. The argument made is not inconsistent with the proposition there must be what is equivalent to a compliance with the provision of the policy requiring proofs of loss to be made, whatever that provision may mean, by furnishing proofs of loss to the company, before any action can be maintained on the policy; but the position is taken with a view to avoid the force of the provision, "proofs of loss" must be furnished as soon after the loss "as possible." The clause of the policy requiring sworn proofs of loss is not introduced into the policy as a condition, or if there be an implied condition, the consequence of a non-observance is expressly stated, viz: the loss shall not be payable until such proofs are made, but not that the policy shall for that reason be forfeited, and hence it is insisted, as assured had one year from the time of loss within which to bring his action, to avail of which, and yet give the insurer sixty days' notice before suit is brought, proofs of loss, under the policy, may be furnished to the company within ten months of the time of the loss. The argument on this branch of the case has for its support much that is ingenious, but it admits of an answer warranted by a reasonable construction of the policy. Whether that clause of the policy requiring sworn proofs of loss to be made as soon after the loss "as possible," shall be regarded as a condition, the non-observance of which would work a forfeiture or not, it is a part of the insurance contract, and there must be what is an equivalent with a compliance with it before any action can be maintained upon the policy. A declaration on a policy having such a clause must contain an averment of compliance with its provisions, and proof must be made as to the same on the trial. Accordingly, in one count of the declaration in this case of the loss sustained it is averred "plaintiff forthwith gave notice to defendant in writing, and as soon as possible thereafter, to-wit, on the same day, delivered to the defendant a particu-

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lar account thereof;" and in an amended count it is averred, when the loss occurred "plaintiff forthwith gave notice to the defendant in writing, * * * and delivered to said defendant a particular account thereof." Had these averments been omitted, obviously the declaration would have been bad on demurrer, unless it had been averred the performance of these acts had been waived by defendant.

What will be regarded as a compliance with the provisions of a policy containing the words, "in case of loss assured shall forthwith give notice of said loss, * * * and as soon after as possible render a particular account of such loss," is often a question involved in much difficulty. Each particular case is determined by the attending circumstances which distinguish it from other cases. That which would be regarded as a compliance with such a provision in a policy under some circumstances, under others might not be so regarded. This fact accounts, in a large measure, for the contrariety of decisions on this question. In this State, at least, the meaning of the words "forthwith," and "as soon after as possible," when employed in an insurance contract, as they are used in the policy declared on, has been definitely determined by previous decisions. They are understood to mean within "a reasonable time," "without unreasonable delay," and are the equivalent of "due diligence." Hence this rule, deducible from adjudged cases, is, if the act to be done is required to be "forthwith," or "as soon as possible," or "immediately," proof it were done with "due diligence," under the circumstances, and "without unreasonable delay," will be deemed sufficient proof it were done in apt time. *Peoria M. and F. Ins. Co. v. Lewis*, 18 Ill. 553; *Knickerbocker Ins. Co. v. Gould*, 80 id. 388; *Same v. McGinnis*, 87 id. 70.

Construing the evidence most favorably for plaintiff, even under the liberal doctrine of the cases cited, it can not be insisted, with any show of reason, the "proofs of loss" were furnished within any "reasonable time," or "without any

Mr. Justice DICKEY, dissenting.

unreasonable delay." If the delay suffered to intervene the loss and making proofs in this case would not bar the action on the policy under the circumstances proven, it would be difficult to conceive of a case where delay in making "proofs of loss" would operate as a bar to the action. No attempt was made to furnish the company with proofs of loss until after the lapse of nine months from the time of loss, and no excuse is shown by the evidence that even tends to justify the delay. It is not claimed plaintiff was lulled to non-action by anything any officer or agent of the company did or said concerning "proofs of loss." No waiver of the terms of the policy in this regard is insisted upon. Indeed, assured had no communication with any agent of the company on the subject, although the office of the local agent was near the office occupied by assured. Evidence appearing in this record, by stipulation, shows the proofs of loss were in fact made out within ten days after the loss occurred, and could have been served at any time, had assured elected to do so. The fact he was embarrassed by threatened proceedings in bankruptcy constitutes no valid excuse. No receiver had been appointed, and it was plainly the duty of assured to make proofs of the loss sustained. Where no circumstances are proven that justify the delay suffered to intervene, to hold that proofs of loss furnished nine months after the loss were furnished "as soon as possible," would be to extend the rule further than is warranted by the authorities.

The findings of the courts whence this cause comes were warranted both by the law and the evidence, and the judgment will be affirmed.

Judgment affirmed.

Mr. Justice DICKEY: I can not concur in this decision. The policy nowhere provides that a failure to make proofs as soon as possible shall defeat a recovery. The penalty for such neglect is found in the provisions that payment for the loss can not be demanded until sixty days after proof of loss.

JOHN W. DOANE

v.

MARTHA A. WALKER.

Filed at Ottawa December 12, 1881—Rehearing denied March Term, 1882.

1. *DOWER—widow's quarantine—how lost.* The right of a widow, under sec. 27 of the Dower act of 1845, to retain possession of the dwelling house in which her husband most usually dwelt next before his death, together with the out-houses and plantation, etc., until her dower be assigned, like other rights, may be transferred, lost, or forfeited by her own acts, and when it becomes the subject of litigation in a court having jurisdiction to pass upon it, the owner of such right will be concluded by the adjudication with respect to it, precisely in the same way, and to the same extent, as in any other case where property rights have become the subject of judicial determination.

2. *SAME—in the particular case—where dower was not finally fixed as to all the lands.* In this case a widow filed her bill for an assignment of dower in several distinct parcels of land, claiming the right of occupancy of the homestead premises until her dower should be assigned in all the lands. The decree in the trial court allowed dower in all the property, but was silent as to the right of the widow to occupy the homestead premises until her dower should be irrevocably fixed with respect to the other lands. On appeal, the decree, in so far as it allowed dower in the homestead premises, was affirmed, but in respect to the other parcels it was reversed. It was held, the effect, by implication, of the adjudication in the trial court as to dower in the homestead place, being silent as to the widow's right of continued occupancy thereof, or quarantine right, until the final disposition of the question of dower in the other property, was to deny her that right, and it was gone.

3. *SAME—petition by administrator to sell land to pay debts—silence of the widow as to quarantine right—estoppel.* Where the widow, in her answer to an administrator's petition for leave to sell certain real estate to pay the debts of his intestate, fails to interpose any claim to retain possession after the assignment of her dower therein until it is finally settled as to other tracts, and the sale is ordered to be made subject to her dower, she will be estopped by the proceeding from setting up such claim as against the purchaser at the administrator's sale.

4. *SAME—on severance of title to lands.* Where a part of the lands of an intestate, in which his widow is entitled to dower, has been sold by the administrator of the estate to pay debts, after the assignment of the widow's dower therein, this will amount to a severance of the title, and the purchaser will take the land bought by him subject only to the dower therein as fixed by the decree allowing it, unaffected and freed from any alleged rights of the

101	628
129	638
129	640
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widow depending upon claims against any of the other lands on account of dower, and he can not be kept out of possession until dower is assigned in the other lands in which he has no interest.

5. *SAME—rights of purchaser when widow wrongfully withholds possession—duty of the widow while in possession.* Where the widow wrongfully deprives a purchaser at an administrator's sale, of the possession of the premises bought by him, it is her duty to pay all taxes thereon, and keep the same in a state of reasonable preservation by making ordinary repairs, and if she fails to do so, she will be bound to account to him for the taxes paid by him, and to make compensation for such damages as he may have sustained by reason of her neglect to make the necessary and ordinary repairs.

6. *DECREE—denial of right by implication.* All such rights, or claims of right, as are submitted by a complainant for adjudication that are not allowed, confirmed or recognized by the decree, are by implication denied, and while such decree remains in force such rights will be barred, whether given by law or by implication.

7. *CHANCERY JURISDICTION—bill for possession of land bought, etc.* A purchaser of land at an administrator's sale, subject to the widow's yearly allowance for dower therein, filed his bill against the widow for possession of the premises, which she refused to give until her dower should be settled in other premises, and for an account of the rents and profits during the time the premises were wrongfully detained, in which he alleged in substance that during the time he had been wrongfully deprived of the possession he was forced to pay all taxes and special assessments on the property, amounting to \$6000, and that during the same time the widow had neglected to make ordinary repairs, whereby the premises had become greatly injured, and were deteriorating in value; also, that during such time the rental value of the property was in excess of her claim for dower, a part of which he sought to have applied in discharge of the dower then due, and the rest to be applied on installments afterwards to become due, and showing that the widow was insolvent, and asking for an equitable set-off: *Held*, that a court of chancery, under the peculiar circumstances of the case, had jurisdiction of the bill. It was not to be regarded merely as a suit for the recovery of possession, and for use and occupation, so as to deprive the complainant of his remedy in equity.

8. *SET-OFF—when allowed in equity.* Where a widow having a claim upon the land of a purchaser for dower, which stands as an incumbrance or lien thereon, affecting its market value, is insolvent, and is liable to the purchaser in a sum in excess of the amount due from him to her for the use of the premises unjustly detained from him, so that on a fair accounting he owes her nothing, but she is largely his debtor, a court of chancery will afford the purchaser relief through the medium of an equitable set-off.

Statement of the case.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

On the 28th of May, 1874, Martin O. Walker died intestate, leaving Martha A. Walker, his widow, and Samuel O. and Edward S. Walker, his only heirs. At the time of Walker's death he was the owner in fee, subject to certain incumbrances, of several pieces of land in the city of Chicago, Cook county, including what is known, respectively, as the Fort Dearborn and the Ellis avenue property, the latter being the property now in controversy. In August following, the widow, Martha A. Walker, filed a bill in the Superior Court of Cook county against the heirs and administrator of Martin O. Walker, for the assignment of dower in all of the above mentioned lands. In January following, a decree was entered in the cause, adjudging her entitled absolutely to dower in all the property except the Fort Dearborn property, and contingently entitled to dower in that, and appointing commissioners to assign the same. On the 12th of July, 1877, the commissioners reported the premises not susceptible of division without prejudice, and at the instance of petitioner the yearly value of her dower in each separate tract was assessed by a jury, being fixed in the Ellis avenue property at \$350 per annum, and in the Fort Dearborn property at \$1500, subject to the contingency above referred to, and a final decree was entered accordingly, April 10, 1878. On appeal to the Appellate Court by the heirs, the above decree was reversed so far as it affected the Fort Dearborn property, but as respects the rest, including the Ellis avenue property, it was in all things affirmed, and is still in full force and effect.

Pending this proceeding for the assignment of dower, to-wit, on the 4th of April, 1876, Augustus L. Chetlain, as administrator of Martin O. Walker, filed a petition in the

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probate court of Cook county for an order of sale of real estate for the payment of the debts of said estate, making Martha A. Walker, the widow, a party. In her answer to said petition she simply sets up her claim to dower in all the lands referred to in the petition, and the fact that the bill filed by her for the assignment of dower was then pending and undetermined in the Superior Court of Cook county.

On the 30th of August, 1878, an order was entered by the probate court in said proceeding, directing the administrator to sell, subject to the widow's dower, the real estate mentioned in the petition, or so much thereof as might be necessary for the payment of debts. Under this order of sale, John Doane, the appellant, on the 15th of October, 1878, at the administrator's sale, purchased the Ellis avenue property, the sale being duly approved by the court, and on the 22d of the same month received of the administrator a deed for the premises, and no question is made as to the regularity or validity of the proceedings.

The decree in the proceeding for the assignment of dower relating to the Ellis avenue property, directed the sum of \$87.50 to be paid to appellee on the 21st day of May, 1878, and the like sum of \$87.50 quarter-yearly thereafter, on the 21st days of August, November, February and May, during her natural life, "and these payments, by the further order of the court, were secured by making them a specific lien upon the property, with power of sale in default of payment." Upon the reversal of the decree in the Superior Court as to the Fort Dearborn property, the cause was remanded for further proceedings as to that property, and the same is still undetermined.

Under this state of facts appellee refused to surrender to appellant the Ellis avenue property, on the sole ground that her dower had not been assigned in the Fort Dearborn property. Appellant, after waiting a considerable time for the

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determination of that suit, filed the present bill, by which he seeks to obtain possession of the premises in controversy, an account of the rents and profits during the time he has been kept out of possession, and to have the same applied, so far as they shall be required for that purpose, in discharge and satisfaction of what is due and to become due appellee on account of dower in said premises, which is declared to be an incumbrance and cloud on appellant's title, and the same is asked to be removed as such.

In addition to the facts already stated, the bill in this case charges that the property in question is worth some \$30,000; that the improvements thereon are much out of repair, and are becoming valueless by reason of waste permitted by appellee; "that during the six years and upwards since the death of M. O. Walker, no improvements or repairs have been put on the buildings, and that they are rapidly deteriorating in value by appellee's neglect, and appellant's property rights therein are becoming greatly injured by refusal of appellee to deliver possession;" that she is insolvent, and unable to respond in damages for the unlawful detention of the premises; that during this time she has refused to pay any portion of the taxes and special assessments on said property, which appellant has been forced to pay; that at the time of appellant's purchase there were unpaid taxes in arrear upon the premises, amounting to \$6000, which, in addition to the purchase money, he has since paid, and that the rents of the premises during the time he has been kept out of possession are double the amount due appellee on account of dower.

The Superior Court sustained a demurrer to this bill, and entered a final decree dismissing the same, and on appeal this decree was affirmed by the Appellate Court for the First District, and appellant thereupon removed the record to this court for review.

Messrs. SMALL & MOORE, and Mr. GEO. L. PADDOCK, for the appellant:

Whenever the dower right is determined by joinder in the husband's deed of the homestead under the statutory formalities, the wife, *ipso facto*, ceases to be dowable of that land, and, as a legal result, her quarantine rights are barred, they being incident to the dower right. *Slatter v. Meek*, 35 Ala. 528.

If the widow may bar herself by acts prior to the decease of the husband, she certainly may by acts done after that time. Acceptance of a collateral satisfaction in lieu of dower is one of the modes in which she may so bar her claim of dower. *Jones v. Powell*, 6 Johns. Ch. 194.

The statutory allowance in lieu of dower, whether regarded as resulting from the voluntary act of the petitioner, or as a legal result of her relations to the property, is, in substance, a collateral satisfaction of the dower claim. Rev. Stat. 1845, "Dower," sec. 28.

It follows, that the dowress is in the attitude of any one else who has transferred his rights to property. She can not retain the thing transferred so long as the instrument working the transfer is in force and unimpeached in any respect.

The decree is based on matter arising since the former decree, requiring averment and extrinsic proof, in order that it may be made to appear to the court. The present is substantially a bill to enforce the former decree.

Speaking of bills to carry decrees into execution, Daniell, in his Chancery Pleading and Practice, page 1585, says: "A bill of this description may also be brought by or against a person claiming as assignee of a party to the decree,"—citing *Organ v. Gardiner*, 1 Ch. Ca. 231; *Lord Carteret v. Paschal*, 3 P. Wms. 197; *Binks v. Binks*, 2 Bligh, 593.

Messrs. ISHAM & LINCOLN, for the appellee:

Appellee defends upon the ground that ever since the death of her husband she has been and is entitled to the posses-

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sion of the homestead, under section 27 of the Dower act then in force. Until dower has been assigned in the whole of her husband's estate, the statute has given her a shelter for herself and family. Her dower in the major part of the estate has not yet been assigned. See *Strawn v. Strawn's Heirs*, 50 Ill. 256.

If appellant has any right to the possession of this property, his remedy is at law.

If, as appellant contends, the widow's dower has been assigned and her quarantine has expired, the heir or his assigns may maintain ejectment against her, and it is the proper remedy. 2 Scribner on Dower, p. 31; *Jackson v. O'Donaghy*, 7 Johns. 247.

Courts of chancery, in this State, have no jurisdiction in suits to recover possession of land held adversely. *Green v. Spring*, 43 Ill. 280.

Neither is there any matter of account involved in this case such as will call for interference by a court of chancery. *Craig v. McKinney*, 72 Ill. 312.

MR. JUSTICE MULKEY delivered the opinion of the Court:

A rehearing having been granted in this case, it is again brought before us for further consideration. When first before us, from the consideration then given it the conclusion was reached, that under the facts presented by the record appellee, by virtue of the 27th section of the Dower act, was, notwithstanding the decree in the proceeding to assign dower, entitled to retain possession of the premises in controversy until her dower was assigned in the Fort Dearborn property also. Upon more mature consideration, however, we are satisfied that the conclusion then reached can not be sustained, either upon principle or authority. The error into which the court then fell is attributable, probably, to giving an undue importance to the section of the statute just referred to, and at the same time under-estimating the legal

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effect of the decrees, both in the proceeding to assign dower and to sell the premises to pay debts.

At first blush it would seem plausible to conclude, that inasmuch as the statute expressly declares the widow shall retain possession of the entire homestead premises until her dower is assigned, courts are powerless to disturb her in that possession until her dower is so assigned, and such is the fact if she has done nothing to authorize the courts to interpose. But the proposition is not absolutely and unconditionally true. This right of the widow to retain possession does not differ in principle from any other right which the law casts upon her with respect to the lands of her deceased husband. Like other rights, it may be transferred, lost, or forfeited by her own acts, and when it becomes the subject of litigation in a court having jurisdiction to pass upon it, the owner of such right will be concluded by the adjudication with respect to it, precisely in the same way, and to the same extent, as in any other case where property rights have become the subject of judicial determination.

Without stopping to inquire whether the 27th section of the Dower act then in force applies to the extent claimed to a case like the present, where a part of the estate to which the dower attached has been transferred under an order of court to pay debts,—but conceding, for the purposes of the argument, it does, we are nevertheless fully satisfied, from a careful consideration of the question, that appellee, by filing her bill for the assignment of dower, conferred upon the court full power and jurisdiction to adjudicate and pass upon whatever rights she had in the premises, including the right to occupy them till her dower was assigned in the other property. And the court having entered a final decree in the cause, without having provided for her further occupancy of them, and without having postponed the operation of the decree till that event, she is concluded by its provisions, and can not be heard to insist upon any rights with

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respect to the premises which are not secured by the decree itself, so long as that decree remains in force. *Loomis v. Riley*, 24 Ill. 307; *Abbott's Trial Evidence*, p. 828.

The appellee, in her bill, claimed dower in the Ellis avenue property, and also the right to occupy the premises until her dower was assigned in the other property mentioned in the bill. The court, by its decree, found she was entitled to dower, saying nothing about the right to occupy the premises till her dower was irrevocably fixed with respect to the other property. This silence in the decree with respect to the right of occupancy is, in legal effect, a denial of it; for, like the right to dower, it was submitted to the adjudication of the court, and it is clear that all such rights as are submitted for adjudication that are not confirmed or recognized by the decree, are by implication denied. And it is no answer, as already stated, to say this right is expressly given by law, for all rights are given by law, either expressly, or by necessary implication, which amounts to the same thing; for it is a familiar rule that whatever is necessarily implied, is as much a part of the law as that which is expressly stated to be so.

But even if the law permitted any speculations upon this question, it is clear, from the specific provisions of the decree, that it was intended to take effect immediately. The decree, by its express terms, required appellant to commence the quarterly payments of appellee's dower on the 21st day of May, 1878, and to continue them during her natural life. As to appellant, therefore, there is no question but that the decree became operative at once, and surely, by every principle of natural justice, if it became operative as to one of the parties, it should be regarded operative as to both. Can it be seriously contended that appellee, under this decree, was entitled to the exclusive occupation and enjoyment of the premises, and also at the same time to her allowance on account of dower during such occupancy? And was it

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intended that appellant should go on indefinitely making payments of this allowance, about which there can be no question, and yet at the same time be denied all participation in the use and enjoyment of the property? The simple statement of these questions shows the manifest injustice of giving the decree such a construction.

Nor will it do to say the decree must be regarded as not taking effect as to either party until after her dower is assigned in the Fort Dearborn property, for that would be not only in direct conflict with the express provision of the decree, which requires payment of the dower on specified days, but also in utter disregard of the universal and fundamental principle that all decrees and judgments take effect and become binding upon the parties from their dates, unless otherwise expressly provided.

But there are other manifest reasons why this view should not prevail; for, assuming such to be a proper construction of the decree, appellant's right to enjoy the benefit of his purchase would be made wholly dependent upon the termination of litigation between strangers in which he has no interest which the law recognizes, and over which he has not the slightest control. The rendition of the decree, and acquiescence in it, as to those premises, by all the parties to the suit, followed by the administrator's conveyance of them to appellant, was a complete severance of any supposed community of interest between appellant and the other parties to the suit, and he is now a complete stranger to the litigation going on between appellee and the heirs with respect to the Fort Dearborn property, just as much so as if a separate suit had been commenced for the assignment of dower in that property to which he was no party. This being so, there is neither reason nor justice in making his rights depend in any degree upon that litigation, for if this could be done, he might be kept out of the property indefinitely, without any power to obtain redress. By a little collusion between the

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widow and one of the heirs in such a case, which might very naturally happen between mother and child, the purchaser of a part of the estate at an administrator's sale might be kept out of his property indefinitely, for he would have no power to compel the heir to assign dower in a piece of land in which he himself had no interest.

The doctrine is well settled that where the defendants in a bill for the assignment of dower, own undivided interests in the lands sought to be partitioned, and the yearly value of the dower is assessed under the statute, it is error to render a decree against all the defendants jointly for the whole amount assessed. In such case, "it should be apportioned among the defendants according to their several interests, and a decree entered against each for his proper share." *Atkin v. Merrell*, 39 Ill. 63; *Peyton v. Jeffries*, 50 id. 143; *Scammon et al. v. Campbell*, 75 id. 223. When this has once been done with respect to a particular piece of land, and that decree has been affirmed by a court of review, so that the rights of the parties are irrevocably fixed, as was the case here, there will remain nothing to be done except to carry the decree into effect as made. If such be the rule with respect to tenants in common where there is a community of interest, it will hardly be denied the reasons for applying it are much stronger where there has been, as was the case here, a complete severance of the interests in the lands subject to the dower, by a sale under an order of court, of a distinct part of them. After such conveyance by the administrator the heirs ceased to have any interest in the premises in controversy; and as to appellant, he has not now, nor has he at any time, so far as this record shows, had, any interest in the other pieces of property mentioned in the bill. Such being the case, it is difficult to perceive how his rights in the premises can be made to depend upon the result of a controversy with respect to which he has never had the slightest interest. But it may be said that he bought subject

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to pending litigation, and must take subject to its results. That is not strictly accurate, for the litigation as to the property in controversy had already terminated when he bought, and he took subject to the decree which had previously been rendered in the dower proceeding, and which, as appears on the face of the decree itself, operated as a complete severance of appellee's dower, so that each tract became wholly unaffected by and freed from all claims against either of the others on account of dower.

It is, therefore, clear that appellant purchased the premises subject to such claims and incumbrances as existed by virtue of that decree, and no others. To the decree alone, then, we must look for the measure of his liabilities. To extend it beyond that would not only be unjust to appellant, but would certainly result in the most serious consequences. Its direct tendency would be to destroy confidence in public records, unsettle titles to landed estates, and retard their improvement and free transfer from one to another, which it has ever been the settled policy of the State to encourage.

Looking, then, to the decree alone to ascertain the extent of appellant's liability, we find he is simply required to pay appellee \$87.50 quarterly, during her natural life, and this is all. On the other hand, he is clearly entitled to the possession of the property. He has all the time been, and is now, ready and willing to perform this decree on his part; nevertheless he is kept out of the possession of the premises on account of a matter he has no interest in or control over, and to which there is not the most distant allusion made in the decree. Appellant not only has the right to rely on this decree, but also on the decree in the proceeding by the administrator to sell the premises for the payment of debts, for it is through the latter he derives title. As already seen, appellee was made a party defendant to the petition of the administrator, and in her answer thereto she interposed no claim to retain possession after the assignment of her dower

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in the premises in controversy until it was assigned and finally settled in the other tracts. Conceding she had such a right, she was bound then to interpose it. She will not be permitted to remain silent when duty and good faith to purchasers required her to speak, and then suffer her afterwards to come in and defeat a title acquired upon the faith of that proceeding, by setting up some new and independent claim which she failed to disclose in her answer. Good faith and fair dealing estop her from enforcing such a claim. When one is made a party to a suit affecting real estate, and is brought into court upon the ground he is supposed to have or claims some interest in it, it is his duty to fully disclose in his answer the nature and extent of his interest in the property, if he has any; and on his failure to do so, he will be estopped from afterwards setting up some new claim to the property not contained in the answer, as against one who has in good faith purchased under such proceeding.

To this rule an exception has been allowed in favor of married women with respect to their rights, and the homestead exemption laws. This exception, however, rests upon considerations of public policy, and should not be extended beyond the reasons which led to its adoption. Suppose A, claiming to be the equitable owner of a piece of land, files a bill for the purpose of recovering the same and having the title confirmed in himself, making B, who is the real and true owner, a party, the bill simply alleging, as is generally the case, that B claims to have some interest in the premises unknown to complainant, and the cause proceeds to a decree declaring the property and right of possession to be in the complainant, B, though duly summoned, having failed to disclose his title, we presume that no one, in the case supposed, would for a moment question the right of A to the premises, so long as that decree was acquiesced in by B. Until reversed, or otherwise set aside, it would be conclusive on him and all persons claiming under him. While the law

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gives the widow a mere temporary defeasible right to her quarantine, it at the same time gives both the right of property and of possession absolutely to the owner in fee, which he, and those claiming under him, may enjoy forever. This being so, it is difficult to perceive upon what principle it can be reasonably claimed that the rights of the owner in fee, which are superior to all other rights in real property, may be lost by his neglect to assert them when drawn into litigation, and yet at the same time insist this mere temporary right of quarantine can not be lost in the same manner. If it be said the law gives the widow the right to retain possession till her dower is assigned, the answer is, as already stated, the law also gives the owner in fee and his heirs both the right of possession and of property for all time to come, and still both may be lost by the *laches* of the owner. So, if there is any difference in this respect between the two cases, it would seem to be in favor of the owner in fee. But on principle there is no such difference. The rights of both, within their respective spheres, are equally protected by law, yet either may be lost by neglecting to assert it when legally drawn in question.

It is objected, however, that, conceding appellant's right of possession, as claimed by him, he has a complete remedy at law, and for that reason the present bill can not be maintained. If the only object of the bill was to obtain possession of the premises, and to recover for their use and occupation during the time they have been wrongfully detained by appellee, the objection would undoubtedly be well taken; but such we do not regard as being the case. There is such a complication of circumstances, equitable in their character, connected with the objects of the bill, as in our judgment to warrant the interposition of a court of equity. For instance, it is charged in the bill, and admitted by the demurrer, that during the time appellant was wrongfully deprived of the possession of the premises he was forced to pay all taxes and

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special assessments, which amounted to a considerable sum of money, and that during the same time appellee neglected to make ordinary repairs, by reason of which the premises had become greatly injured and out of repair. Now, it is clear that so long as appellee wrongfully deprived appellant of the possession of the premises, it was her duty to keep them in a state of reasonable preservation by making ordinary repairs, and also to pay all taxes levied thereon, and appellant, by reason of her neglect, having been forced to incur these expenses himself, she is unquestionably bound to account to him for them, and also to make compensation to him for such damages as he may have sustained by reason of her neglect to make reasonable and ordinary repairs. Now, it is manifest that this could all be done, at least, more conveniently in a court of equity than in an action at law for *mesne* profits, if, indeed, it could be done at all in that kind of proceeding.

But in addition to this, the bill discloses the further facts, that during the time the premises were so unlawfully detained the rental value of the property amounted to double her claim for dower, a part of which appellant, by his bill, seeks to have applied in discharge of such installments of dower as are now due, and the residue to the payment of such as shall hereafter become due, till the same shall be exhausted. It is further shown that appellee is insolvent, and that appellant's only means of obtaining satisfaction of what is due him on account of the detention of the premises, etc., as just stated, is by having it set off against her claim for dower. This, in our judgment, presents a clear case for the application of the doctrine of equitable set-off. It may not be technically a case of equitable set-off, yet when considered in connection with the other circumstances of the case, we have no question as to the right of a court of equity to assume jurisdiction of it. Mr. Bispham, in his admirable work on Equity Jurisprudence, in treating of this matter says: "Mere

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matters of set-off will not give the court jurisdiction, for such rights can be effectually tried at law; but where there is anything peculiar in the case, so as to render it impossible for exact justice to be done by a court of law, under the statutes a court of chancery will afford relief through the medium of an equitable set-off." (Page 41, 2d ed.)

That the present case falls directly within the rule here announced, there is, in our judgment, no just room for doubt. The case is simply this: While appellee is justly liable to appellant, on account of rents, etc., in a sum double the amount due from him to her on account of her dower, this claim of hers stands as a charge and incumbrance upon his estate, operating as a cloud upon his title, and injuriously affecting its marketable value. Upon a fair accounting between them he owes her nothing, but, on the contrary, she is largely indebted to him, and yet his estate is thus incumbered. To recover a judgment at law against her would not place him in any better position than he now is,—his estate would still be incumbered with the lien for unpaid dower. The relief which is indispensable to him is to have such an adjustment of their respective claims as will result in the removal of this incumbrance from his estate, and this can only be enforced in a court of equity.

It is a mistake to suppose that the insolvency of appellee has nothing to do with this case. We regard it as a strong equitable feature of it. In *Raleigh v. Raleigh*, 35 Ill. 512, it was said: "The insolvency of a party against whom the set-off is claimed, is a ground for the exercise of equitable jurisdiction,"—citing *Gay v. Gay*, 10 Paige, 376. To the same effect is the case of *Chicago, Danville and Vincennes R. R. Co. v. Field et al.* 86 Ill. 272, where *Raleigh v. Raleigh* is cited with approval. Other authorities might be cited, but we deem it unnecessary.

We are of opinion that the Superior Court erred in sustaining the demurrer to complainant's bill, and in entering a

Syllabus.

final decree dismissing the same, and hence it was error in the Appellate Court to affirm that decree. The judgment of the Appellate Court is therefore reversed, and the cause remanded, with directions to reverse the decree of the Superior Court and remand the cause to that court, with directions to set aside the order sustaining the demurrer, and to overrule the same, and to permit the appellee to answer the bill, if she shall be so advised.

Judgment reversed.

Mr. JUSTICE WALKER: I am unable to concur in the conclusion reached in this case by a majority of the court. By the rules announced, the homestead of appellee, if she has one, is barred and cut off by the decree fixing her dower, when that question was not raised or litigated in this case. There are other propositions in the opinion to which I do not assent.

Mr. CHIEF JUSTICE CRAIG, and Mr. JUSTICE DICKEY, also dissent.

JOHN A. LYLE

v.

CHARLES M. JACQUES *et al.*

Filed at Ottawa November 10, 1881—Rehearing denied March Term, 1882.

1. TAXATION—who is liable for taxes as owner. Where commission merchants were to furnish money to country dealers with which to purchase grain, who were to pay ten per cent interest for the use of the money until it was paid, and the commission merchants were to receive one cent a bushel as commission in handling and selling the same, the country dealers to pay all expenses, and have all the net profits, and bear the losses, if any, and to turn over the grain, when bought, to the agent of the parties advancing the money: *Held*, that the transaction between the two firms was a loan of money by the former, with a security on the grain for its repayment, and that

101	644
121	512
122	808

101	644
191	*856

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the grain belonged to the latter firm, and was properly assessed and taxed to them.

2. *SAME—mistake in owner's name will not vitiate tax.* An error or informality in assessing a lot of grain belonging in fact to a firm, in the name of C. M. Jacques & Co. instead of Jacques Bros. & Co., the proper name, the two firm names representing really the same persons, will not invalidate the tax, or furnish any ground for enjoining its collection from the firm. Equity will not interfere because of mere errors in the assessment, where the tax is authorized by law, and is upon property subject to taxation.

3. *SAME—enjoining sale of individual property for taxes due from firm.* A partnership firm can not enjoin the collector from selling the individual property of one of its members for the taxes due from the firm. That is a matter for the individual partner himself to complain of, and does not injuriously affect the firm.

4. *SAME—notice of sale—as to the place.* A collector's notice of the sale of property for taxes described the property, which was bulky and not movable readily, as standing on a certain fractional quarter section, and that the sale would be at R., in W. county, and the evidence showed that the quarter section was within the limits of the town of R., which was east and west one mile in length, and north and south one-half mile in extent, and containing 1000 inhabitants: *Held*, that from the character of the property the reasonable understanding from the notice was, that the sale was to be at the place in R. where the property was described as standing.

WRIT OF ERROR to the Circuit Court of Whiteside county;
the Hon. JOHN V. EUSTACE, Judge, presiding.

Mr. WALTER STAGER, for the plaintiff in error:

The property was assessed to the complainants by their proper name. The proof shows they transacted business under several firm names, including that used by the assessor.

Equity will not enjoin a tax for errors in its assessment or levy, or proceedings to collect. *C., B. and Q. R. R. Co. v. Frary*, 22 Ill. 36; *Merritt v. Farris*, 22 id. 312; *Metz v. Anderson*, 23 id. 469; *Cook Co. v. C., B. etc. R. R. Co.* 35 id. 465; *Vieley v. Thompson*, 44 id. 13; *DuPage Co. v. Jenks*, 65 id. 286; *Swinney v. Beard*, 71 id. 30; *Andrews v. Rumsey*, 75 id. 600; *Huck v. C. and A. R. R. Co.* 86 id. 360; *Town of Ottawa v. Walker*, 21 id. 610; *Munson v. Minor*, 22 id. 602; *Drake v. Phillips*, 40 id. 393; *Munson v. Miller*, 66 id. 383;

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Village of Nunda v. Chrystal Lake, 79 id. 314; *Evans v. Gage*, 1 Bradw. 206.

Since 1873 the statute has provided that no error in the tax list, in any of the proceedings connected with the assessment, levy or collection of taxes, not affecting the substantial justice of the tax itself, shall vitiate or affect the tax, etc. Rev. Stat. 1874, 889, sec. 191. See *Buck v. People*, 78 Ill. 566; *Chiniquy v. People*, 78 id. 575; *Thatcher v. People*, 79 id. 606; *Fisher v. People*, 84 id. 496; *Moore v. Fessenbeck*, 88 id. 423; *Purrrington v. People*, 79 id. 13; *Andrews v. People*, 84 id. 35; *Union Trust Co. v. Weber*, 96 id. 351; *Beers v. People*, 83 id. 493.

Part of the property assessed—the cribs—it is admitted, belonged to the complainants. The cribs and corn were assessed together. They should, before suing, have tendered the taxes due on the cribs. *O'Kane v. Treat*, 25 Ill. 562; *Taylor v. Thompson*, 42 id. 17; *Briscoe v. Allison*, 43 id. 296; *Allen v. Peoria, etc. R. R. Co.* 44 id. 90; *Huck v. C. and A. R. R. Co.* 86 id. 360; *Wilson v. Weber*, 3 Bradw. 133; *State Railroad Cases*, 92 U. S. 575.

If part of the property levied on is the separate property of some person other than the complainants, such fact furnishes no ground for enjoining the sale of such property at the suit of complainants. *DuPage Co. v. Jenks*, 65 Ill. 275.

Even conceding that such property belongs to a member of the firm of Jacques Bros. & Co., that does not help their case. Complainants have sued only as a firm, and can not litigate matters concerning only an individual member of the firm. *Lawson v. Kolbenson*, 61 Ill. 417.

We submit that the notice of the sale is sufficient. As to the time, it is in the language of the statute, and this is all that is required. *Burr v. Borden*, 61 Ill. 392.

Considering the size of the village of Rock Falls, the notice is not so indefinite as to place, that any harm would be likely to result therefrom. Conceding the notice to be defective as

Brief for the Defendants in Error.

to time and place of sale, that would give the complainants no standing in equity. *Finnegan v. City of Fernandina*, 15 Fla. 379.

Messrs. BENNETT & GREEN, and Mr. C. L. SHELDON, for the defendants in error:

The corn was improperly assessed to C. M. Jacques & Co., as the same was not then owned and never had been owned by any such firm; neither had the assessor any reason for mistaking this firm's name for that of Jacques Bros. & Co., if the corn was properly assessable to them, because, as shown by the testimony, the use of the name C. M. Jacques & Co., as a mode of signing grain checks, was not adopted until the September after the assessment. *Cooley on Taxation*, 279, note; *People v. Whipple*, 47 Cal. 591.

The corn was turned over to Stevens, Deane & Co. before May 1, 1879, and on that day was in the charge of their agent, whose duty it was to list it. *Rev. Stat.* 859, p. 10.

The assessor had no right, even on the supposition the cribs were personal property, to assess them against C. M. Jacques after he had made out his list and delivered it to the assessor, and it had been received by him without objection, unless after notice to Jacques that he proposed so to increase his assessment. *Cooley on Taxation*, 268; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Green*, 50 id. 424; *McConky v. Smith*, 73 id. 313.

The collector levied his warrant upon the corn-cribs, which were fixtures, and could not be sold by distress separate from the land or the leasehold estate in the same. *Ewell on Fixtures*, 362; *Reynolds v. Shuler*, 5 Cow. 323; *Conklin v. Foster*, 57 Ill. 104.

The machinery of the elevator, connected as the horse power was, can not, as between the owner of the freehold and a creditor or tax collector, be taken on execution or distress. *Ewell on Fixtures*, 360, 353.

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In tax sales all the statutory requirements in relation to notice should be strictly observed. Cooley on Taxation, 304, 563.

And having disregarded the statutory provisions on that subject, the collector became a trespasser *ab initio*. Cooley on Taxation, 304. 563.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

In 1879 the assessor in the town of Coloma, in Whiteside county, assessed certain corn-cribs and corn contained therein, upon which assessment the county clerk extended the tax, and on the non-payment thereof John A. Lyle, the collector of said town, levied his warrant for the collection of the tax on certain property as the property of C. M. Jacques & Co., and advertised the same for sale. The complainants, Charles M. Jacques, John M. Jacques, Rufus H. Sheldon, and Rufus H. Sheldon, Jr., under the firm name and style of Jacques Bros. & Co., filed their bill to enjoin the sale of the property levied upon, and the collection of the tax. The circuit court decreed in favor of the complainants, and the defendant brings the case here on writ of error.

The main ground upon which relief is asked is, that the property assessed belonged to Stevens, Deane & Co., and should not have been assessed to complainants.

It appears that Stevens, Deane & Co. were grain and commission merchants, doing business in Chicago, and Jacques Bros. & Co. were a firm in the grain and stock business at Rock Falls, Whiteside county; that the corn in question was purchased by Jacques Bros. & Co. with money furnished to them by Stevens, Deane & Co., in pursuance of an arrangement previously made, whereby the latter were to furnish money to purchase corn, and Jacques Bros. & Co. were to pay ten per cent interest for the use of the money until it was repaid. Besides this interest, Stevens, Deane & Co. were to receive one cent a bushel as commission in handling and selling the

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grain. Jacques Bros. & Co. were to pay all expenses, and have all the net profits, and bear the losses, if any, on the sale of the corn. The corn was to be turned over to Mr. Nance, a banker at Rock Falls, and Stevens, Deane & Co. were to have possession of it. Mr. Nance testifies that on May 1, 1879, he held the corn in question, as custodian of Stevens, Deane & Co. The name of Stevens, Deane & Co. was placed on the cribs.

The transaction between these two firms, as it is thus presented, was a loan of the money with which the corn was bought, to Jacques Bros. & Co., and a security upon the corn for the repayment of the money, with interest. It was the corn of the complainants, subject to the lien on it of Stevens, Deane & Co. for the repayment of the money they advanced. Under this arrangement, too, between the two firms, this tax would be an item of expense, with regard to the corn, which it would be for the complainants to pay,—it would go in reduction of the net profits which they were to receive, and they come unfavorably into a court of equity asking to have the tax shifted from themselves to Stevens, Deane & Co. There is no equitable ground of complaint that the assessment was made to the complainants.

It is said that the firm name of complainants is Jacques Bros. & Co., and that the assessor erred in assessing the property to them by the name of C. M. Jacques & Co. It appears that in doing their business complainants have used the three several names of Jacques Bros. & Co., C. M. Jacques & Co., and J. M. Jacques & Co., the explanation being that they kept separate accounts with their banker in doing their grain and stock business, and that in drawing checks different names were used to distinguish the accounts. Complainants claim that after September, 1879, they drew their grain checks in the name of C. M. Jacques & Co., and before that time in the name of J. M. Jacques & Co. or Jacques Bros. & Co. only. The assessor testifies that about the 1st of June, 1879,

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he informed C. M. Jacques that he had assessed the corn to C. M. Jacques & Co.

It was early declared as the rule in this State, that equity will not interfere, by injunction, to restrain the collection of taxes because of errors in their assessment, where the tax is authorized by law, and it is assessed upon property subject to the tax, (*Chicago, Burlington and Quincy R. R. Co v. Frary*, 22 Ill. 34,) and this general rule has ever since been followed. Besides, it is a provision of the statute that "no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof." Rev. Stat. 1874, p. 890, sec. 191.

The three different names here, Jacques Bros. & Co., J. M. Jacques & Co., and C. M. Jacques & Co., all mean the same—these complainants. There is no pretence that the tax or the assessment respects or concerns any other person than these complainants, and Stevens, Deane & Co. The tax is a just one against the complainants, and making the assessment to them by the name of C. M. Jacques & Co., instead of Jacques Bros. & Co., creates no doubt that complainants were the persons intended, and is not a thing that affects the substantial justice of the tax itself, and at most is but an error in the assessment of such kind that, under the provision of the statute above cited, does not vitiate or affect the tax or assessment, and is no ground for equitable interference with the collection of the tax.

The bill states that some of the property levied on is the separate property of Charles M. Jacques. This we conceive furnishes no ground for enjoining the sale of such property at the suit of complainants. It is a matter for the individual partner himself to complain of, and not these complainants, who sue only as a firm. The mere statement of the bill, that the horse-power—the property of Charles M. Jacques—was

Opinion of the Court.

in the possession of, and under the control of, complainants, we do not regard as showing that they had any substantial right in the property.

Some point is made in the argument that the corn-cribs were buildings situated on leased ground, and which were, for the purposes of taxation, real estate, and were not taxable in the town of Coloma as personalty, neither as realty, separate from the land,—that the corn-cribs were fixtures, and could not be sold by distress separate from the land or the leasehold estate in the same, and that the horse-power levied on by the collector was fastened to a large elevator building with iron bolts, and was a fixture, and could not be removed and sold in this proceeding,—which point we do not notice further, as the bill makes no case of such kind. The allegation of the bill in such regard is simply that the said corn-cribs and separator are the property of, and in possession of, Jacques Bros. & Co., and that the said horse-power, rod and levers are the property of Charles M. Jacques, but in the possession and under the control of complainants, and are a portion of the machinery used by complainants in running an elevator at Rock Falls, and that the separator is run in connection with the elevator, and that the removal of the horse-power and separator would irremediably injure complainants, by the stoppage of the elevator. These allegations, we consider, make no case for the consideration of such question of fixtures as is presented in the argument of appellee's counsel.

It is objected that the collector's notice of sale is defective, in that it does not name the place where the sale of the property would take place. The notice describes the property as standing on the north-east fractional quarter of section 28, describing it, and that the sale would be at Rock Falls, in Whiteside county. The evidence shows the north-east fractional quarter of said section 28 to be within the corporate limits of Rock Falls, and Rock Falls to be in extent one mile east and west, and one-half mile north and south, containing

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1000 inhabitants. From the character of the property, the bulk of it not being movable, the reasonable understanding from the notice would be that it was to be sold at the place in Rock Falls where the property was described in the notice as "standing." We regard the notice as sufficient.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

THE PEOPLE *ex rel.* Hughes

v.

SAMUEL APPLETON.

At Ottawa, March Term, 1882.

PRACTICE IN THE SUPREME COURT—*oral argument on demurrer.* This court will not hear oral argument upon a demurrer to a pleading in an original proceeding here, except the cause is to be finally submitted for consideration on the demurrer.

This is an information presented to this court, in the name of the People, against Samuel Appleton, an attorney of this court, for the purpose of having the defendant's name stricken from the roll of attorneys. The defendant filed his answer, and also took exception to the sufficiency of the information, by way of demurrer thereto, and thereupon moved the court to set the cause down for hearing on oral argument upon the demurrer.

Mr. EDWARD ROBY, for the motion.

CRAIG, Ch. J.: It is not the practice in this court to hear oral argument upon a demurrer except upon a final submission of the cause on the demurrer. If the defendant choose to withdraw his answer and submit the cause for final hearing on the demurrer, we will hear oral argument.

Motion denied.

THE KANKAKEE AND SENECA RAILROAD COMPANY

v.

GEORGE STRAUT.

At Ottawa, March Term, 1882.

APPEAL—*from county court to Supreme Court—in condemnation proceeding.* An appeal will lie directly from the county court to the Supreme Court in a proceeding to condemn land for a right of way for a railroad, under the Eminent Domain act.

APPEAL from the County Court of Grundy county.

This was a proceeding in the court below to condemn land for a right of way for a railroad over the premises of appellee. The railroad company appealed. A motion is now made on behalf of the appellee to dismiss the appeal for the want of jurisdiction in this court, it being insisted the appeal should have been taken to the Appellate Court.

Messrs. DOUD & WING, for the motion, contended that the 12th section of the Eminent Domain act, giving an appeal directly from the county court to this court, was repealed by section 67 of the Practice act, (acts 1877, p. 149,) and that this appeal should have been taken to the Appellate Court.

Mr. M. N. ARMSTRONG, *contra*.

WALKER, J.: The 12th section of the Eminent Domain act, in express terms, gives the right of appeal in cases of this character, directly from the trial court to this court. We do not think anything contained in the Practice act should be held to operate as a repeal of that section. The appeal was properly taken from the county court to this court.

Motion denied.

101	653
126	273
101	653
161	613

PAUL G. HAWLEY

v.

JOHN R. SIMMONS *et al.**At Ottawa, March Term, 1882.*

REHEARING—*additional suggestions in support of petition.* Additional suggestions in respect to the grounds of an application for rehearing in this court, proposed to be made after the time prescribed by the rules for the filing of the petition, will not be received as of course, but only upon proper cause shown.

A petition for a rehearing of this cause was filed in behalf of the defendants in error, in vacation preceding the March term, 1882. At that term counsel for the petitioners asked leave to file additional suggestions in support of the application for rehearing.

Messrs. A. G. McDole, and Mr. E. F. Bull, for the motion.

SCOTT, J.: The motion for leave to file additional suggestions in support of the petition for a rehearing can not be allowed. The practice in regard to the time of filing the petition is regulated by rule forty-one, and that rule should in all cases be strictly observed, unless, upon special cause shown, we should deem it proper to grant the indulgence of making further suggestions as to the grounds of the application, after the original petition has been filed. Such indulgence will not be granted as of course. Special cause must be shown, and that has not been done on this motion.

Motion denied.

DICKEY, J.: I think the motion ought to be allowed. The rule prescribing the time within which petitions for rehearings shall be filed, was adopted mainly for the purpose of facilitating the publication of the decisions of the court, and should not be regarded as an iron rule to control in all cases.

Where a petition has been filed within the rule, and the party afterwards asks leave to file additional suggestions in support of his petition, and the action of the court will not be improperly delayed thereby, I see no good reason why it should not be allowed, even without special cause shown.

LIZZIE W. R. ALLEN

v.

JOHN V. LE MOYNE *et al.*

At Ottawa, March Term, 1882.

PRACTICE IN THE SUPREME COURT—*supplying deficiencies in the record—at what time.* It is too late, after the decision of this court has been rendered in a cause, and pending an application for a rehearing, to ask for leave to supply alleged deficiencies in the record, unless there be shown very special circumstances calling for an exception to be made to the usual and proper mode of proceeding.

Pending an application for a rehearing of this cause, counsel for the plaintiff in error entered the following motions:

First—To receive and file the additional transcript herewith presented, as part of the record in the above entitled cause, and to consider the same in connection with the transcript already filed, upon the assignment of errors alleged thereon.

Second—Said counsel also moves for leave to assign as an additional error upon the record in this cause the denial of the motion in said additional transcript shown.

Third—Said counsel also moves for an order commanding the circuit court to allow said motion in said transcript shown, or for such order in the premises as the circumstances of the case may require.

101	655
166	161

Opinion of the Court.

Fourth—Said counsel also moves the court to consider the motion to file affidavits, and require amendment of record according to offer made.

In support of these motions, counsel suggested that this was a suit in chancery, in which oral testimony was heard, but that such testimony was not preserved in the record, alleging that the absence of the oral evidence was attributable to obstructions interposed by the counsel for the defendants in error.

Mr. EDWARD ROBY, for the motions.

Mr. JOHN P. WILSON, *contra*.

MULKEY, J.: Ordinarily, the purpose of a rehearing of a cause which has been decided by this court, is to bring in review the decision already made, in the light of the facts as they appeared of record at the time of the original hearing, and the law as applicable to those facts. If it happen that the record is so far incomplete as not to present the real merits of the case as developed on the trial in the court below, steps should be taken in apt time to supply the deficiency. It is too late at this stage of the case,—after the decision of the court has been rendered, and pending an application for a rehearing,—to ask that the alleged omitted matter be now supplied, and thus perhaps present an entirely different case for our consideration from that submitted for determination on the original hearing. Such a practice would be exceedingly objectionable, as enabling parties to bring their cases to this court by piecemeal, and should not obtain in any case except there be shown very special circumstances, which we do not discover here, requiring a deviation from the usual course. The motions will have to be denied.

Motions denied.

ALBERT PAUL SMITH *et al.* Admrs.*v.*

FRANKLIN DENNISON, Receiver.

At Ottawa, March Term, 1882.

1. REHEARING—*second application by the same party.* A second petition for the rehearing of a cause in this court by the same party will not be entertained.

2. Nor is the application of this rule affected by the fact that the court, upon denying the original petition for a rehearing, may have modified the language of its opinion, or even changed the grounds of its decision. It is the *decision* of the court, not so much *the reasons given* for that decision, that is the subject for reconsideration upon an application for a rehearing, and when the decision originally made is adhered to upon such reconsideration, although the reasons given for it may have been modified, it will not be open to further review at the instance of the same party.

The original opinion in this case was filed in vacation preceding the September term, 1881. The defendant in error filed his petition for a rehearing of the cause, under the rules of this court, which was considered at that term, and denied, the court, however, taking occasion to modify, in some respects, the language of the opinion previously filed, but adhering to its decision already made. Subsequently, the defendant in error filed his second petition for a rehearing to the present term.

Mr. J. L. HIGH, for the defendant in error, insisted that the right to present this second petition was given by the 41st rule of this court, this being the first application for a rehearing in respect to the modified opinion.

SCOTT, J.: This second petition for a rehearing can not be entertained. It has never been the practice in this court to permit the filing of a second petition of this character by the same party. *Garrick et al. v. Chamberlain*, 100 Ill. 476. It matters not that upon the denial of the first petition the

Mr. Justice DICKEY, dissenting.

court saw proper to modify the language of its opinion previously filed. It is the *decision* of the court, not so much the reasons which may have been assigned for that decision, that is the subject for reconsideration upon an application for the rehearing of a cause. If the decision originally made is adhered to on such reconsideration, although the reasons given for it may be modified, or the grounds of the decision changed, it will not be open to further review at the instance of the same party.

Petition dismissed.

DICKEY, J.: I think that sometimes a second petition for a rehearing, by the same party, may well be entertained. I do not object so much to the application of the rule in this particular case, as the modification of the opinion does not seem to be very material, though I think the petition ought to have been simply denied, not dismissed. Cases may arise where, upon an application for a rehearing, although the original decision of the court be adhered to, the grounds of that decision may be so essentially changed, that it would be highly proper, even at the instance of the same party, to entertain a second petition for rehearing.

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IMPEACHING THE CERTIFICATE.

1. *Sufficiency of proof.* The testimony of a widow that she never joined with her husband in the execution of a deed, or acknowledged the same, is not sufficient to overcome the certificate of the officer as to her acknowledgment, and his testimony in support thereof. *Jackson v. Miner et al.* 550.

2. In the absence of evidence of fraud, conspiracy or overreaching of any kind, or anything casting a suspicion upon the integrity or honesty of the certifying officer, and when the certificate of acknowledgment of a deed is in conformity with the statute, it can not be impeached by merely negating the facts therein stated. *Strauch et al. v. Hathaway et al.* 11.

3. As between the former owner of land and an innocent purchaser under a deed of trust, before the title of the latter can be defeated by impeaching the truthfulness of the certificate of acknowledgment to the trust deed, the evidence must be clear and conclusive, excluding every reasonable doubt. *Ibid.* 11.

ACTIONS.

WHAT IS THE "GIST" OF AN ACTION.

1. The *gist* of an action is the cause, ground or foundation of the suit, without which it will not lie, or in other words, the ground essential to give rise to a cause of action. *First National Bank of Flora v. Burkett*, 391.

WHEN MALICE IS OF THE GIST.

2. If a party wrongfully and dishonestly draws money of his own in the hands of another, after giving a draft for the same to one who advances him the money upon it, the fraud so practiced upon the party advancing him the money is of the essence or foundation of an action on the case against him, and is malicious, within the statutory sense of that word, as used in section 2 of the Insolvent Debtor's act. *Ibid.* 391.

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3. *Whether recoverable back.** Where a person buying milk pays for the same, counting each can as containing eight gallons, supposing the cans to hold that much, when in fact they do not, he may set off the money paid by him for the shortage out of any sum he may owe the seller, in a suit for its price. *Devine v. Edwards*, 138.

LAYING RAILROAD TRACK IN STREET.

4. *Under license from the city—remedy of private individuals.* A court of equity will not take jurisdiction to restrain the laying of a railroad side-track by a company in the public street in front of its own property, to connect with the main track of a railway, under license by the city council, by ordinance, on a bill by private individuals owning property in the vicinity, but not abutting on the part of the street to be used. *Truesdale et al. v. Peoria Grape Sugar Co.* 561.

5. Any damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the license of the city holding the fee of the street, must be sought in an action at law. *Ibid.* 561.

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6. *Right of action in adjacent lot owner.* See HIGHWAYS, 5.

SPLITTING AN ENTIRE CAUSE OF ACTION.

7. *A party can not divide an entire demand or cause of action, and maintain several suits for its recovery; and a recovery for a part of an entire demand will bar an action for the remainder, if due at the time the first action was commenced.* *Dulaney v. Payne et al.* 325.

AS TO DISTINCT CAUSES OF ACTION.

8. Where a plaintiff has several distinct causes of action, he may elect to sue upon one, or any one of them he chooses, and he has the further election to unite in one suit, under certain restrictions, several causes of action. *Ibid.* 325.

9. *What are distinct causes of action—of a note with interest payable in installments.* Where a promissory note is given, payable in two or more years, with interest payable annually, or semi-annually, the holder may, at the end of each year, or half year, as the case may be, sue and recover the interest, and this will be no bar to a suit on the note when it shall become due. *Ibid.* 325.

10. Where a note is given, payable in one year, with interest payable semi-annually, and a suit brought two years thereafter to recover the

* Where a person, by mistake, overpays another, he may recover the sum so overpaid, notwithstanding a receipt may have been given. *Stempel v. Thomas*, 89 Ill. 146. Or where the services for which the money was paid have not been performed. *Moore v. Robinson*, 92 Ill. 491. And generally, as to voluntary and compulsory payments, *County of La Salle v. Simmons*, 5 Gilm. 513, upon a review of authorities by TREAT, C. J.

ACTIONS. AS TO DISTINCT CAUSES OF ACTION. *Continued.*

installments of interest then due, and a recovery therein, such judgment will be no bar to a subsequent action on the note to recover the principal. In such case, the promise to pay interest is a distinct cause of action from the promise to pay the principal. Each promise constitutes a distinct cause of action. *Dulaney v. Payne et al.* 325.

ADMINISTRATION OF ESTATES.**JURISDICTION OF THE CIRCUIT COURT.**

1. *In suit at law against executors.* The circuit court has, under sec. 12, art. 6, of the constitution, jurisdiction of an action of assumpsit brought against the executors of an estate upon a claim which had accrued against the testator, and this jurisdiction is unaffected by the statute conferring jurisdiction upon the county court in the same class of cases. *Darling et al. v. McDonald*, 370.

CLASSIFICATION OF CLAIMS BY CIRCUIT COURT.

2. *After rendering judgment.* The circuit court, after rendering judgment against executors, to be paid in the due course of administration, has full power, as an incident to its jurisdiction to pronounce the judgment, afterwards to direct its classification, the same as the county court may do on the allowance of a claim, and order that the record be certified to the county court; and that court, having power to enforce the settlement of the estate, has the power, and it is its duty, to include in such settlement the payment of such judgment. *Ibid.* 370.

EFFECT OF JUDGMENT IN CIRCUIT COURT.

3. *How far conclusive on county court.* A judgment against executors in a suit brought in the circuit court, sustains the same relation to the assets of the estate as a judgment in the county court. Such a judgment is not subject to the revision of the county court, but it must enforce its payment the same as a claim allowed in that court. *Ibid.* 370.

PROOF OF JUDGMENTS OF OTHER COURTS.

4. *When offered in the county court—as to the mode.* A judgment regularly obtained against the personal representatives of a deceased person is duly proven to the county court, under sec. 65 of chap. 3, Rev. Stat., by a copy thereof, duly certified. Such certified copy shows it to be a legal claim against the estate to the extent it purports. This section has nothing to do with taking judgments against estates, but is simply confined to declaring a rule of evidence in regard to judgments already obtained against estates. *Ibid.* 370.

PRESENTATION OF CLAIMS IN THE COUNTY COURT.

5. *What claims are embraced in the requirement.* The claims required to be presented to the county court at the term fixed upon for the adjustment of claims against an estate, are those which have not been liquidated or established, and upon which it is necessary to hear evidence, and not those which have been reduced to judgment binding upon the executors or administrators. *Ibid.* 370.

ADMINISTRATION OF ESTATES.

PRESENTATION OF CLAIMS IN THE COUNTY COURT. *Continued.*

6. Section 61 of the act concerning the administration of estates, in regard to bringing suits against the executor or administrator of an estate in the county court, does not require suits to be brought on a judgment of another court already binding the executor or administrator, but relates to claims not established as a legal charge against the estate, and upon which there is to be a regular trial as in any other causes at law. *Darling et al. v. McDonald*, 370.

REVOCATION OF LETTERS IMPROPERLY OBTAINED.

7. Where a person failing to have his claim allowed in the State of an intestate, comes to this State, and on his representation that he is a creditor of the deceased, procures letters of administration here, and it is made apparent on the trial of his claim that he is no creditor, it is proper not only to disallow his claim, but also to enter an order revoking the letters of administration. *Wernse et al. v. Hall*, Admr. 423.

ADMINISTRATION IN THE STATE OF MISSOURI.

8. *Jurisdiction in the courts of that State, as to suits against executors, etc.—judgment void for want of jurisdiction.* By a statute of Missouri it is provided that "all actions commenced against the executor or administrator" of an estate shall be considered "demands legally exhibited against such estate, from the time of serving original process on such executor or administrator." By another statute it was shown that the probate court of Ralls county, and others, had exclusive jurisdiction "to hear and determine all suits and other proceedings against administrators, upon any demand against the estate of their testator or intestate." A judgment was obtained in the circuit court of St. Louis against the administrator of the estate of a person who died a resident of Ralls county, in that State, in which county the administration was had, and the institution of the suit in which that judgment was obtained was claimed as an exhibition of the claim, to save it from the operation of the limitation laws of that State: *Held*, that the judgment, and the whole proceeding in the St. Louis circuit court, were void for want of jurisdiction of the subject matter, and could not be set up to avoid the limitation in a proceeding in this State to recover upon the same demand. *Ibid*. 423.

LIMITATION—CLAIM BARRED IN THE STATE OF THE DOMICILE.

9. *As to demands against estates in the State of Missouri—what is a proper exhibiting of a claim in that State.* The Missouri statute provides that all demands against estates of deceased persons, not legally exhibited within two years after the granting of the first letters of administration, shall be forever barred; and further, that "any person may exhibit his demand * * * by serving upon the executor or administrator a notice in writing, stating the amount and nature of his claim, with a copy of the instrument of writing or account upon which it is founded, and such claim shall be considered as legally exhibited, from

ADMINISTRATION OF ESTATES.

LIMITATION—CLAIM BARRED IN STATE OF THE DOMICILE. *Continued.*

the time of serving such notice;" but it is also provided that no claimant shall avail himself of this mode of exhibiting his demand, "unless he shall present his demand" to the proper probate court within three years after the granting of the first letters of administration: *Held*, in a proceeding in a county court in this State for an allowance of the same claim, administration having been granted here, that the presentation of a void judgment of another court to the probate court, not for allowance, but for classification, within the three years, did not take the case out of the operation of the limitation, which provides that where a demand against the estate of a deceased non-resident is barred by the laws of the State where he was domiciled at the time of his death, it is equally barred in this State. *Wernse et al. v. Hall, Admr.* 423.

TWO YEARS LIMITATION.

10. *Of the proper judgment.* In a suit against the representatives of an estate of a deceased person, when the defence is successfully interposed that the suit was not commenced, or the claim was not exhibited, within two years after the grant of administration, the judgment must be special, and payable out of assets thereafter to be inventoried, corresponding to the common law judgment of *quando acciderint*. *Darling et al. v. McDonald*, 370.

11. Such a judgment does not imply assets for the satisfaction of the debt. The presumption at the end of two years from the grant of administration is, that the personal estate has been fully inventoried, or accounted for, by the executor or administrator. *Ibid.* 370.

JUDGMENT PAYABLE "IN DUE COURSE OF ADMINISTRATION."

12. *Out of what assets to be satisfied.* A judgment of the circuit court against executors, to be paid in the due course of administration, is not limited to subsequently discovered or inventoried assets for payment, but is to be paid out of assets administered in the manner and order that other debts of like dignity are to be paid. Such a judgment binds the assets in the hands of the administrator, and it is the duty of the executors to pay it without further notice or demand, the statute fixing its grade or class. *Ibid.* 370.

ADMINISTRATOR'S POWERS AND DUTIES IN RESPECT TO LAW.

13. It was not the duty of an administrator, under the laws in force in 1844, to pay the taxes upon the lands of his intestate, the title being in the heirs, who were entitled to the rents and profits. His power was only to apply for and obtain leave to sell the lands for the payment of debts, and he could not take any steps to remove liens or incumbrances of any kind. *Stark et al. v. Brown et al.* 395.

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ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 1 to 5.

AMENDMENTS.

AMENDMENT OF PROCESS.

1. *After judgment or decree, and at subsequent term.* No amendment is allowable to the service of process at a subsequent term of court to the one at which the decree or judgment was rendered, as a matter of course, without notice to the parties alleged to have been regularly served, or whose rights will be directly affected thereby. And this rule applies, though they are not parties to the suit being tried when the amendment is sought to be made. *Thriffs v. Fritz*, 457.

APPEALS AND WRITS OF ERROR.

WHAT MATTERS EMBRACED IN AN APPEAL.

1. *As to what is a separate proceeding.* On appeal by an alleged purchaser of mortgaged premises at a master's sale, who was also a party complainant to the bill to foreclose, he holding the senior mortgage, from a decree requiring him to pay the difference between the amount bid by him and the amount realized on a resale, the original record in the proceedings to foreclose can not be considered by this court as evidence of any facts, unless offered in evidence in the proceeding against the purchaser, and preserved in the record of that case by bill of exceptions or certificate of the judge. In such case the motion or petition to enforce the liability of the purchaser is a separate and independent proceeding. *Thriffs v. Fritz*, 457.

APPEALS AND WRITS OF ERROR. *Continued.*

APPEAL FROM JUSTICE OF THE PEACE TO CIRCUIT COURT.

2. *On complaint to keep the peace.* Where, on the trial of a complaint to bind one over to keep the peace, the defendant is discharged, and the justice of the peace renders judgment against the prosecutor for costs, on the ground that the complaint was malicious, the latter has the right to appeal to the circuit court from such judgment against him for the costs, he being a defendant as to that judgment. *Berman v. The People*, 322.

3. *Of the questions arising on such appeal.* In such case the defendant in the original proceeding can not be again tried. The appeal only presents the rightfulness of the judgment against the prosecutor for the costs of the original prosecution. *Ibid.* 322.

APPEAL FROM COUNTY COURT TO SUPREME COURT.

4. *In condemnation proceeding.* An appeal will lie directly from the county court to the Supreme Court in a proceeding to condemn land for a right of way for a railroad, under the Eminent Domain act. *Kankakee and Seneca Railroad Co. v. Straut*, 653.

APPEALS FROM APPELLATE COURTS.

5. *Decision of Appellate Court not conclusive on questions of law.* If, during the progress of a trial, the court improperly admits or excludes evidence, or otherwise commits error, except in passing upon questions of fact in its final determination, and such erroneous ruling or other error is preserved in the record, and the Appellate Court fails to correct it, it may be done in this court. *Wrought Iron Bridge Co. v. Comrs. of Highways*, 518.

REVIEWING QUESTIONS OF FACT.

6. *Extent of the restriction.* The decision of the Appellate Court upon all questions of controverted fact is made final and conclusive upon this court by the statute, except as to certain classes of cases enumerated therein. *Ibid.* 518.

7. The statutory provision making the judgments of the Appellate Courts "final and conclusive as to all matters of fact in controversy," embraces not only the principal facts upon which a right to recover is claimed, but also the evidentiary facts, or facts which are mere evidence of the principal facts,—in other words, it includes the ultimate facts to be proven on the trial, together with all subordinate facts offered as evidence of their existence. *Ibid.* 518.

8. *Inference as to the facts from a finding against plaintiff.* Where an issue of fact is found against the plaintiff by both the circuit and Appellate courts, the legal inference is that the plaintiff failed to prove the principal facts upon which his right to recover rested,—in other words, that the evidentiary facts did not sustain the principal or ultimate facts. *Ibid.* 518.

APPEALS AND WRITS OF ERROR. *Continued.*

FREEHOLD—WHETHER INVOLVED.

9. No appeal lies directly from the circuit court to this court, from an order dismissing a bill seeking to set aside a sale of land on execution, on the ground of its being the complainant's homestead, as no freehold is involved in the suit. *Galbraith v. Plasters*, 444.

10. It is not enough that the freehold be affected, it must be involved, —that is, directly the subject of the litigation,—to give the Supreme Court jurisdiction by appeal directly from the circuit court. *Ibid.* 444.

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CHARACTER OF A PARTICULAR TRANSACTION.

1. *Rights under a transfer as between partners.* Where one partner transfers and delivers to another all the assets of the firm, to collect the debts due the firm and pay and discharge its liabilities, giving such managing partner all the powers possessed by both, for the purpose of settling the partnership affairs and a division of the proceeds after payment of the debts, this is not an assignment for the benefit of creditors of the firm, but one for the benefit of the parties, and will not prevent the partner taking the assignment from securing one creditor to the prejudice of others. *Smith et al. v. Dennison, Receiver*, 531.

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CHANCERY.

JURISDICTION.

1. *Remedy at law.* Where a contract for the purchase of land alleged to have been induced by fraudulent and false representations is abrogated by the parties, without any promise to return the purchase money paid, and the purchaser takes a contract for the purchase of the same land for the sum due on the original purchase, from a third person, who is invested with the title, a court of equity has no jurisdiction of a bill by the purchaser seeking to recover back the money paid the original vendor, on the ground of fraud, the remedy being at law, if any. *Crane et al. v. Lord*, 41.

BILL FOR POSSESSION OF LAND, ETC.

2. *Jurisdiction in chancery.* A purchaser of land at an administrator's sale, subject to the widow's yearly allowance for dower therein, filed his bill against the widow for possession of the premises, which she refused to give until her dower should be settled in other premises, and

CHANCERY. BILL FOR POSSESSION OF LAND, ETC. *Continued.*

for an account of the rents and profits during the time the premises were wrongfully detained, in which he alleged in substance that during the time he had been wrongfully deprived of the possession he was forced to pay all taxes and special assessments on the property, amounting to \$6000, and that during the same time the widow had neglected to make ordinary repairs, whereby the premises had become greatly injured, and were deteriorating in value; also, that during such time the rental value of the property was in excess of her claim for dower, a part of which he sought to have applied in discharge of the dower then due, and the rest to be applied on installments afterwards to become due, and showing that the widow was insolvent, and asking for an equitable set-off: *Held*, that a court of chancery, under the peculiar circumstances of the case, had jurisdiction of the bill. It was not to be regarded merely as a suit for the recovery of possession, and for use and occupation, so as to deprive the complainant of his remedy in equity. *Doane v. Walker*, 628.

LAYING RAILROAD TRACK IN STREET.

3. *Remedy of private individuals—not in chancery.* See INJUNCTIONS, 2, 3.

COMPELLING THE ISSUE OF MUNICIPAL BONDS.

4. *Remedy is by mandamus, not in chancery.* See MANDAMUS, 1.

REMOVING CLOUD UPON TITLE.

5. *What constitutes such cloud.* Where the purchaser of land takes actual possession, and makes payment of the purchase money before the recovery of a judgment against the vendor, a subsequent sale of the property under the judgment, and a sheriff's deed to the assignee of the creditor, will be set aside as a cloud upon the title of the purchaser. *Walsh et al. v. Wright*, 178.

6. *Requisites of the bill.* A bill to set aside certain deeds made for property sold for taxes, as a cloud upon the title, which fails to allege any invalidity in the sale or tax deeds, is bad on demurrer. *Gage v. McLaughlin*, 155.

CREDITOR'S BILL.

7. *Whether it will lie.* A bill can not be maintained as a creditor's bill when not framed as such, nor when no judgment has been obtained and execution returned *nulla bona*. *Chicago, Danville and Vincennes Railroad Co. et al. v. The Town of St. Anne et al.* 151.

ESTATES OF INFANTS.

8. *A court of equity, under its general powers, has jurisdiction over the estates of infants* and others under disability, and may, on proper application, order the sale of an infant's unproductive lands to raise means for discharging an incumbrance on productive property in which it has a reversionary interest in fee, though the latter be situate in

CHANCERY. ESTATES OF INFANTS. *Continued.*

another State, where the bill seeking such relief shows that such a course is for the best interests of the infant. *Allman et al. v. Taylor et al.* 185.

IMPEACHING JUDICIAL SALE.

9. *Party can not still retain the proceeds.* A party can not impeach a sale of his interest in land, under a proceeding by his co-tenants, when he has received and retains his share of the proceeds, on any ground, either for want of jurisdiction in the court ordering the sale, or for any irregularity in the sale. He who seeks equity must do equity. Before he can be heard to deny the validity of the sale he should restore, or offer to return, the money so received by him. *Byars et al. v. Spencer et al.* 429.

SPECIFIC PERFORMANCE.

10. *Conditions to granting relief.* To authorize the specific performance of a contract it must be complete, specific and certain, as well as fair and honest,—not the result of mistake,—and must have been fully performed, or an ability and a readiness and an offer to perform, on the part of the party seeking its enforcement, must be shown. *Briz v. Ott*, 70.

11. A part performance at least, with a readiness to perform the remainder, on the part of the complainant, is indispensable to authorize the specific enforcement of a contract. *Ibid.* 70.

12. *Lack of certainty in description of land as a ground for refusing to decree specific performance.* See DESCRIPTION, 4.

AIDING DEFECTIVE EXECUTION OF POWER.

13. *In what cases equity will interpose.* See POWERS, 5.

ONLY PROPER EVIDENCE CONSIDERED.

14. *Presumption.* In chancery cases, it will be presumed that the court disregarded incompetent evidence on the hearing, especially where there is competent evidence on which to base its decree. *Ritter v. Schenk et al.* 387.

REFERENCE TO THE MASTER.

15. *Practice as to making objections—when parties concluded by master's report.* Where matters of fact are referred to a master, it is the duty of the parties, when notified, to appear before him and there contest the matter, and if his findings are not correct in their judgment, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report, if wrong. If on such hearing the master declines to change his report, the objecting party must file exceptions to it when it is filed. When this course is not pursued, and no sufficient reason is assigned for not doing so, the master's report, when approved by the court, will in this court be deemed conclusive upon the questions covered by it. *Jewell et al. v. Rock River Paper Co.* *et al.* 57.

CHANCERY. Continued.**SET-OFF.**

16. *When allowed in equity.* Where a widow having a claim upon the land of a purchaser for dower, which stands as an incumbrance or lien thereon, affecting its market value, is insolvent, and is liable to the purchaser in a sum in excess of the amount due from him to her for the use of the premises unjustly detained from him, so that on a fair accounting he owes her nothing, but she is largely his debtor, a court of chancery will afford the purchaser relief through the medium of an equitable set-off. *Doane v. Walker*, 628.

ENFORCING HOMESTEAD RIGHT—IN EQUITY.

17. *The party must do equity—as, in the return of money paid on the supposition the homestead was released.* *Winslow et al. v. Noble et al.* 194. See **HOMESTEAD**, 10.

IMPROVEMENTS.

18. *Allowance therefor on setting aside conveyance of land.* See **IMPROVEMENTS**, 1.

LACHES—STALE CLAIMS.

19. *Whether a bar to relief.* See **LIMITATIONS**, 9, 10, 11.

FORMER ADJUDICATION—PRACTICE.

20. *In what manner a former adjudication to be presented, as to matter set up in answer in chancery.* *Thrifft v. Fritz*, 457. See **FORMER ADJUDICATION**, 1.

CITIES AND VILLAGES. See **CORPORATIONS**, 27 to 32.

CLOUD UPON TITLE. See **CHANCERY**, 5, 6.

COLLATERALS.**OF THE MANNER OF THEIR USE.**

1. *May be given to secure more than one debt.* Where a firm has given collaterals as security for a loan, and procures a further loan upon additional collaterals, the firm may, in obtaining such new loan, contract with the person advancing the money that he may hold the securities as collateral to both debts, or his entire claim. *Smith et al. v. Dennison, Receiver*, 531.

COLOR OF TITLE. See **LIMITATIONS**, 4, 6.

COMPROMISE.**AS BETWEEN DEBTOR AND CREDITOR.**

Whether fraudulent—omission by debtor to inform the creditor of a gift he had previously made. *Jackson v. Miner et al.* 550. See **FRAUD**, 1.

CONFLICT OF LAWS.**ADOPTED CHILD—UNDER LAWS OF ANOTHER STATE.**

1. *Of his right of inheritance in this State.* *Keegan v. Geraghty et al.* 26. See DESCENTS, 2.

LIMITATION IN ANOTHER STATE.

2. *Operation of the bar in this State.* See LIMITATIONS, 7; ADMINISTRATION OF ESTATES, 9.

CONSTITUTIONAL LAW.**JURISDICTION OF JUSTICES OF THE PEACE.**

1. *Of their territorial jurisdiction—uniformity required—constitutionality of the act of 1881 re-districting Cook county.* *People ex rel. v. Meech*, 200. See JUSTICES OF THE PEACE, 3.

AS TO LIABILITY OF STOCKHOLDERS.

2. *Changing the conditions as to liability for debts of corporation, by subsequent legislation—under constitution of 1848—not an impairment of the obligations of contracts.* *Weidenger v. Spruance*, 278. See STOCKHOLDERS, 1 to 6.

CHANGE OF REMEDY AND PENALTY.

3. *In respect to insolvent insurance companies—power of the legislature.* See CORPORATIONS, 17.

IMPAIRING OBLIGATION OF CONTRACT.

4. *Act of 1874 concerning the dissolution of insurance companies—its constitutionality.* *Chicago Life Ins. Co. v. The Auditor*, 82. See CORPORATIONS, 15.

LOCAL AND SPECIAL LEGISLATION.

5. *As to the constitutionality of the same act in that regard.* See same title, 16.
6. *As to act of 1881 re-districting Cook county in reference to jurisdiction of justices of the peace.* See JUSTICES OF THE PEACE, 3.

CONSTRUCTION.**CONSTRUCTION OF DEEDS AND WILLS.**

- The intention must prevail.* See CONVEYANCES, 1.

CONSTRUCTION OF STATUTES. See STATUTES, 1 to 11.**CONTRACTS.****CONTRACT OF SALE—PLACE OF DELIVERY.**

1. Where a contract for the sale and delivery of personalty, such as milk, expressly provides that it is to be shipped by the seller to the place of business of the purchaser, at the expense of the seller, the place of delivery is the business place of the purchaser, and any loss on the way must fall upon the seller. *Devine v. Edwards*, 138.

CONTRACTS. *Continued.*

CONTRACT PARTLY IN WRITING AND PARTLY IN PAROL.

2. *Parol agreement inconsistent with that which is in writing can not prevail.* See CORPORATIONS, 4.

RESCISSION OF CONTRACTS.

3. *Can not be had after contract has been abrogated, and new one entered into with another.* A sold B a fourth interest in certain real property, receiving part payment, and notes for the balance. Afterwards the conveyance to B was cancelled, and a new one made to B's wife, who gave her notes for the balance due, secured by trust deed to C, which notes A indorsed to C. B becoming dissatisfied, all parties came together, when a new arrangement was made, by which the deed to B's wife was surrendered and her notes given up, and B then took a contract from C for the same premises, giving his notes to him for the sum due on the prior contract. B afterwards filed his bill against A to set aside his original contract as fraudulent, but not making C a party, or seeking to have the contract with him rescinded: *Held*, that by the subsequent arrangement the original contracts with A were abrogated, and there was no contract between A and B to be rescinded. *Crane et al. v. Lord*, 41.

CONVEYANCES.

CONSTRUCTION OF DEEDS AND WILLS.

1. *The intention must control.* It is a rule in construing deeds or wills, that the intention of the grantor or testator, as manifested by the words of the writings, in connection with the surrounding circumstances, must be carried into effect, if no rule of law will thereby be violated, or sound public policy be disturbed. In ascertaining such intention one clause or part is not to be viewed but in connection with all the other parts. *City of Peoria v. Darst et al.* 609.

CHARACTER OF ESTATE CREATED BY DEED.

2. *As to inheritance from grantee.* A father of two illegitimate children conveyed real estate to their mother for her life, with remainder in fee to such children, or the survivor of them, who might survive their mother or leave issue, and in the *habendum* clause of the deed provided that if such children should survive their mother, and die without making any disposition of the property, by will or otherwise, and without issue, then it should go to the city of Peoria, etc.: *Held*, that the intent was, that in case of the survivorship of the children they should take and enjoy the property devised to their use *personally*, and have the full benefit of it, even to the extent of selling or devising it in fee; but in case of their death without issue, or disposition of it by them, no such estate had vested in them as could pass by *descent* to any one. *Ibid.* 609.

3. *A deed construed—whether a vested or contingent remainder.* Where the father of two illegitimate children conveyed real estate to their mother for the term of her natural life, with remainder to his two

CONVEYANCES. CHARACTER OF ESTATE CREATED BY DEED. *Continued.*

children in fee simple, as joint tenants,—that is to say, the mother to have a life estate in the property, and at her death the fee simple to vest in the children, or in the survivor of them, with this further clause immediately following: "If, however, both of them should die before the termination of the C. estate," (that being the life estate of the mother,) "and to leave no child or children, then at the death of the said C. the title is to vest in the city of Peoria for the benefit of orphan children," etc., it was *held*, the grant to the children was not of a vested remainder, but that they took a contingent right only, depending upon the event of both or one of them surviving the mother or having issue, and they both having died in the lifetime of the mother, leaving no issue, that the title, on the death of the mother, vested in the city of Peoria. *City of Peoria v. Darst et al.* 609.

DELIVERY OF DEEDS.

4. *A delivery is essential* to render a deed operative, and it does not take effect until it is delivered. Without delivery it is void. *Byars et al. v. Spencer et al.* 429.

5. *What amounts to a delivery—to whom it may be made.* The delivery of a deed may be to the grantee or to his agents, and no particular form or ceremony is necessary to constitute a sufficient delivery. It may be by acts, or words, or both; but what is said or done must clearly manifest the intention of the grantor and of the grantee, that the deed shall at once become operative, to pass the title, and that the grantor shall lose all control over it. *Ibid.* 429.

6. Where a deed is executed and delivered to a stranger, to be delivered to the grantee, without conditions, it will be a sufficient delivery to pass the title; but the execution of a deed, and having it recorded, without the knowledge of the grantee, is not a delivery. *Ibid.* 429.

7. When the facts show that the grantor did not intend to lose control over the deed, and he still continues to have power over the title without the consent of the grantee, there is not such a delivery as the law requires to render it a deed, and it can not pass title. *Ibid.* 429.

8. So, where a father made and acknowledged a deed to his two minor children, but retained it until his death, and declined to have it recorded, on the express ground that he would thereby place the title beyond his power or control, and expressed an intention, after he had made and acknowledged the deed, to sell the land if he could get a certain price, and in pursuance of that intention did offer to sell the land, it was *held*, that the deed was inoperative for want of a delivery. *Ibid.* 429.

TRUSTEE'S DEED.

9. *Condition precedent to vesting of estate—how far essential—effect of recitals in the deed.* See TRUSTS AND TRUSTEES, 10.

CONVEYANCES. *Continued.*

TENDER OF A DEED.

10. *How far the party making the tender is bound by the terms and conditions in the deed.* See TENDER, 1.

IMPEACHING CERTIFICATE OF ACKNOWLEDGMENT.

11. *Of the requisite proof.* See ACKNOWLEDGMENTS OF DEEDS, 1, 2, 3.

CORPORATIONS.

SUBSCRIPTION OF STOCK—EVIDENCE.

1. *Certified articles of association—evidence that capital stock has been subscribed.* The articles of association of a corporation, certified by the Secretary of State, are *prima facie* evidence of the fact that the full amount of the capital stock required by the articles has been subscribed, and is sufficient proof of that fact until overcome by rebutting evidence. *Jewell et al. v. Rock River Paper Co. et al.* 57.

SUBSCRIBERS TO STOCK—CONDITIONS OF LIABILITY.

2. *Subscription in blank as to amount—by whom the blank to be supplied—estoppel.* If a party signs a subscription book for stock in a contemplated corporation, merely to induce others to subscribe the same, leaving the amount of his own subscription blank, it is but fair to hold that, as to creditors of the company, he thereby impliedly authorizes those empowered to take subscriptions to fill up the blank, and that when done such subscriber will be estopped from questioning their authority to do so. *Ibid.* 57.

3. *Special privileges to subscribers as to liability—can not affect creditors.* The creditors of a private corporation organized under the general law of 1872, can not be affected by a mere private understanding between the subscribers and the subscription agent of the company, by which the former are exonerated from the payment of their subscriptions, wholly or in part, contrary to its terms, nor by the fact that many of the subscribers at the time of subscribing were notoriously insolvent; and such facts constitute no defence to the collection of subscriptions from solvent parties for the benefit of creditors of such company. *Ibid.* 57.

4. *A parol agreement, made at the time of a written subscription to the capital stock of a private corporation, with some of the subscribers, by the subscription agent, that their subscriptions shall not be collected, or shall be collected only in part, or may be paid in services, being inconsistent with the written contract, is void as to the other subscribers and creditors of the company.* *Ibid.* 57.

FRAUD—IN RE-ORGANIZING OLD CORPORATION.

5. *As affecting liability of stockholders in the new company.* If a new corporation is organized by parties interested in an old one, for the purpose of getting rid of its liabilities and fastening them upon the new

CORPORATIONS.

FRAUD—IN RE-ORGANIZING OLD CORPORATION. *Continued.*

company, and the latter, by arrangement with the creditors of the former company, bids off the property of the old company for the amount of its liability, and gives its notes therefor to such creditors, secured by deed of trust, the fraud, if any, on the part of those representing the old company, can not affect the creditors, and these facts will constitute no defence to a suit to compel the stockholders in the new company to pay their unpaid subscriptions to satisfy the liabilities thus assumed by the new company. *Jewell et al. v. Rock River Paper Co. et al.* 57.

TAKING MORTGAGES ON REAL ESTATE.

6. *As security for debts.* The latter part of sec. 26, of the general Incorporation law of 1872, was not designed to prevent corporations from taking mortgages on real estate as security for debts. It would seem that the right to take such security, by the policy of our law, may be regarded as an incident to the right to create a debt. *Stevens v. Pratt et al.* 206.

LOANING MONEY—BY DOMESTIC AND FOREIGN CORPORATIONS.

7. *Policy of State to give power to make loans, etc.* The policy of the legislature of this State for many years has been to invest corporations with the power to loan money, and take mortgage on real estate as security therefor. *Ibid.* 206.

8. A loan made by a foreign corporation, in 1873, to a citizen of this State, secured by a mortgage given at the time, is not void as being prohibited by any legislation of the State, or contrary to public policy, and such mortgage may be foreclosed, and pass the title to real estate. *Ibid.* 206.

9. *Former decision.* That part of the opinion of the court in *United States Mortgage Co. v. Gross*, 93 Ill. 483, holding that it was a part of the policy of the law of this State, as shown by sec. 1 of the general Incorporation act of 1872, that corporations should not be formed in the State for the business of loaning money, is overruled. *Ibid.* 206.

10. This court also erred in that case in holding that the first sentence of sec. 26 of the general Incorporation law of 1872, manifests a policy that foreign corporations were to have no right to loan money in this State. *Ibid.* 206.

11. The clause in the Incorporation law of 1872, that "corporations may be formed in the manner provided by" that act, "for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money," was not intended to, and does not by implication, prohibit the formation of corporations for the purposes so excepted, under other acts. It only prohibits their formation under that act, and therefore does not show that such corporations are prohibited by the policy of the law. *Ibid.* 206.

CORPORATIONS. *Continued.*

FOREIGN CORPORATIONS.

12. *Of their right to do business in this State.* The general Incorporation law of 1872 neither grants nor prohibits the right of foreign corporations to do business in this State. It is simply a law imposing regulations and restrictions, and its meaning is, that where the general laws of this State provide for the organization of corporations, foreign ones of like character doing business in this State shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions and duties. *Stevens v. Pratt et al.* 206.

13. *Where no provision is made for like domestic.* The failure to provide for the organization of other domestic corporations than those named in the general law on the subject, is not an exclusion of foreign corporations of like character. The excepted corporations, and foreign corporations of like character, are simply unaffected by the general law of 1872; and as the formation of such corporations in the State is not prohibited, there is no prohibition of foreign corporations of the same character from doing business in this State. *Ibid.* 206.

14. *Policy of State—how made to appear.* The policy of a State not to permit the transaction of business in its limits by foreign corporations, or to allow such corporations to acquire and hold real estate, must be expressed in some affirmative way. It can not be affirmed from the fact that the legislature has made no provision for the formation of similar corporations. *Ibid.* 206.

DISSOLUTION OF INSOLVENT INSURANCE COMPANIES.

15. *At the suit of the Auditor—constitutionality of act of 1874, as impairing the obligation of contracts.* The statute of 1874, which authorizes the Auditor to take proceedings for the dissolution of a life insurance company organized in this State under a special charter, granted prior to the passage of that act, whenever he shall be of opinion that such company is insolvent, or its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public, or when the company has failed to comply with the rules, restrictions or conditions provided by law, is not unconstitutional, as impairing the obligation of contracts, especially when such a company has accepted an amendment of its charter, which declares that it shall not be deemed to exempt the company from the operation of such general laws as might afterwards be passed. *Chicago Life Ins. Co. v. The Auditor*, 82.

16. *Act, whether special, regulating practice in courts.* A statute for the dissolution of insurance companies for insolvency, etc., and providing the mode of procedure to have such corporations dissolved, which applies alike to all insurance companies, is not a special law regulating the practice in courts of justice, within the prohibition of sec. 22 of art. 4 of the constitution of 1870. *Ibid.* 82.

CORPORATIONS.

DISSOLUTION OF INSOLVENT INSURANCE COMPANIES. *Continued.*

17. *Change of penalty and remedy against insolvent company.* The general Insurance law of 1869 provided, that on notice by the Auditor an insurance company should cease issuing policies, where its assets were not equal to its liabilities, until its funds should be made equal to its liabilities. In 1874, another and different penalty was provided for insolvency, etc., viz: a dissolution of the corporation: *Held*, that the legislature had the right to change the penalty and remedy, and that the later law must govern. *Chicago Life Ins. Co. v. The Auditor*, 82.

18. *Unpaid securities are not assets.* Securities taken in the name of an insurance company, in the expectation of becoming its property when paid for, but not paid for, are not *bona fide* assets of the company, and exhibiting them as such in the company's report to the Auditor is deceptive to him, and to persons taking insurance, and to the public. *Ibid.* 82.

19. *Good will is not assets.* An insurance company can not establish its solvency, such as the statute requires, by proof that its good will is of the value of \$100,000 to \$150,000. This can not be treated as assets of the company. The assets required by law are funds that will pay losses and liabilities of the company. *Ibid.* 82.

20. *Deficiency of assets—how found.* Under the Insurance law of 1869, where the actual funds of any life insurance company are not of a net value equal to the net value of its policies, according to the "combined experience," or "actuary's" rate of mortality, with interest at four per cent per annum, the Auditor is required to give notice, etc. Under this law it is not proper to estimate on the basis of six per cent in determining the impairment, but the four per cent basis as fixed in the law must govern as showing the deficiency of assets. *Ibid.* 82.

21. *Standard of solvency.* The law requires a higher standard of solvency in an insurance company than that its assets shall be sufficient to meet and pay its matured liabilities. It requires that its assets shall be equal to all its liabilities, whether due or not. *Ibid.* 82.

22. *Offer to re-insure, no defence to proceeding to dissolve corporation.* In a proceeding by the Auditor to have a life insurance company dissolved, under the general law of 1874, for insolvency, an offer by the company to re-insure in other companies for its policyholders is no defence, and can not be taken as making up the company's deficiency of assets. *Ibid.* 82.

23. *Company responsible for the acts of its officers.* The fact that the mismanagement of an insurance company, making its condition such as to be hazardous to the public and parties insured, is attributable to the secretary alone, is no defence to a proceeding by the Auditor to close its business. The public are entitled to protection, no matter by whom the affairs of the company have been mismanaged. *Ibid.* 82.

CORPORATIONS.

DISSOLUTION OF INSOLVENT INSURANCE COMPANIES. *Continued.*

24. *Evidence sustaining a decree of dissolution.* By the charter of a life insurance company, \$100,000 of stock had been subscribed as required, but only ten per cent thereof had been paid in, and the evidence showed that in 1857 the remainder was professedly paid by the notes of the subscribers, payable in nearly all cases on demand, and without interest, payment of which was never demanded, and which were in no way secured, under which the company proceeded to insure, and from 1871 to 1876 made false reports of a capital stock of \$125,000 paid up in cash, and during the same time made dividends, in violation of its by-laws, of \$55,045, when it was in no condition to pay any dividends, and from 1873 to 1876 it scheduled securities, amounting to \$89,422, which it had bought but had never paid for, and made false reports of its receipts and expenditures, and on examination of its affairs and books they showed a heavy deficiency of assets to meet its liabilities: *Held*, that a decree for the dissolution of the company was warranted. *Chicago Life Ins. Co. v. The Auditor*, 82.

LIABILITY OF STOCKHOLDERS IN CORPORATION.

25. "*Shareholder*"—in *National Bank*—who so regarded. *Laing, Admr. v. Burley*, 591. See STOCKHOLDERS, 7.

26. *Changing the conditions as to liability for debts of corporation, by subsequent legislation*—under constitution of 1848. *Weidenger v. Spruance*, 278. See STOCKHOLDERS, 1 to 6.

MUNICIPAL CORPORATIONS.

27. *Power to require the taking out of license for certain occupations and kinds of business*—construction of the general Incorporation act. Where the legislature, by the general Incorporation act, declares that the corporate authorities of cities and villages organized and acting under its provisions shall have power to license certain occupations and kinds of business, specifically enumerating them, such declaration, by a familiar rule of construction, must be construed precisely as if the law, in express terms, inhibited the licensing of all trades and occupations not contained in the enumeration. *City of Cairo v. Bross*, 475.

28. *As to power to require merchants to take out license.* Under the general Incorporation law, a city organized under its provisions has no power to require merchants to take out a license, and an ordinance so requiring a license, adopted under its special charter before its reorganization under the general law, will cease to have any binding force. *Ibid.* 475.

29. *Uniformity of organization is the purpose of the general law.* The object of the general Incorporation law is to place all cities, towns and villages organized under it, and of the same grade, upon a uniform and common footing with respect to their corporate powers and the manner of exercising them. *Ibid.* 475.

CORPORATIONS. MUNICIPAL CORPORATIONS. *Continued.*

30. *Reorganization under general law—effect upon prior powers and ordinances under special charters.* It was not intended that a change of organization by a city, from its special charter to the general Incorporation law, should at all affect its corporate existence or liabilities, nor that its existing powers or government should be changed or otherwise affected, except so far as the provisions of the general law differed from those of the old charters. So far as their provisions are substantially the same, or not inconsistent with each other, they, together with all ordinances based thereon, are to be continued in force. *City of Cairo v. Bross*, 475.

31. But after such reorganization by a city or village, any laws in its special charter, or otherwise, in conflict with the general law, no longer apply to it under its new organization. *Ibid.* 475.

32. The provision in the general Incorporation law of cities and villages, that "all ordinances, resolutions and by-laws in force in any city or town where it shall organize under this act, shall continue in full force and effect until repealed or amended, notwithstanding such change of organization," was intended to continue in force only such ordinances, etc., adopted under a special charter, which might lawfully be passed under the general law. *Ibid.* 475.

COUNTY COURT.

CONTESTED ELECTION.

As to mayor of a city—county court has jurisdiction. *Winter v. Thistlewood*, 450. See JURISDICTION, 5.

CREDITOR'S BILL. See CHANCERY, 7.

CRIMINAL LAW.

OF THE INDICTMENT.

1. *For receiving stolen goods.* An indictment for receiving stolen goods for gain, etc., should describe the goods with accuracy, and a variance in this particular will be fatal. *Williams et al. v. The People*, 382.

RECEIVING STOLEN MONEY, OR GOODS.

2. *A larceny of the thing must be shown.* It is absolutely essential to a conviction for having received stolen money for gain, knowing it to have been stolen, that the prosecution should prove, beyond a reasonable doubt, that a larceny of the money had been committed. This fact, being the *corpus delicti*, can not be established alone by the confession of the accused. *Ibid.* 382.

3. *Sufficiency of proof in the particular case.* A charge in an indictment that the defendants, "for their own gain, knowingly and feloniously received one gold coin of the value of \$10, one bill, purporting to be issued by the Monmouth National Bank, of the value of \$10, and one

CRIMINAL LAW. RECEIVING STOLEN MONEY, OR GOODS. *Continued.*

bill, purporting to be issued by some National bank, of the value of \$5," knowing them to have been stolen, is not sustained by the testimony of a witness that he found on one of the defendants \$10, and on the other \$15 and some small change, as it does not show it was of the kind and character of money described in the indictment. *Williams et al. v. The People*, 382.

4. *Of the necessary proof—generally.* In order to convict, under sec. 239 of the Criminal Code, for receiving and aiding in concealing stolen goods for gain, or to prevent the owner from recovering the same, etc., it is essential, first, to show that the property alleged to have been received or concealed was in fact stolen; secondly, that the accused received the goods knowing them to have been stolen, guilty knowledge being an essential ingredient of the crime; and lastly, that the accused, for his own gain, or to prevent the owner from recovering the same, bought, received, or aided in concealing the stolen goods. *Aldrich et al. v. The People*, 16.

5. *Effect of giving license.* Where the owner authorizes or licenses another to receive stolen goods, and such other person receives the goods from the thief knowing them to have been stolen, with a felonious intent, he will be guilty of a felony in receiving the property, notwithstanding the license. *Ibid.* 16.

6. *There must be a criminal intent.* Where a defendant, on behalf of the owner, receives stolen goods from the thief, for the honest purpose of restoring them to the owner without fee or reward, or the expectation of any pecuniary compensation, and in fact immediately after obtaining their possession restores all he receives to the owner, and is not acting in concert or connection with the party stealing to make a profit out of the transaction, he will not be guilty, under the statute. *Ibid.* 16.

EVIDENCE.

7. *On indictment for manslaughter—as tending to explain conduct of accused.* On a trial of one for manslaughter, in shooting his father, who was shown to have been of a quarrelsome disposition when under the influence of liquor, and ill-tempered, and abusive towards his wife, the defendant's counsel offered to prove by a witness that the defendant in going to and from his work had to pass by the house of the witness, and that she knew of her own knowledge that it had been the uniform habit of the defendant, at all times when he knew that there was at the time difficulty between his mother and the deceased, to refrain from going home, so as to keep out of the same, at such times expressing a desire to avoid being present, and that the difficulties between the deceased and his wife were of frequent occurrence about the time of the killing: *Held*, that all of such evidence was properly excluded, as not tending to enlighten the issue. *Hirschman v. The People*, 568.

8. *As to previous conduct of the deceased.* On such trial, it appeared that, at the time of the killing, the father was intoxicated and

CRIMINAL LAW. EVIDENCE. *Continued.*

angry, and just preceding the act of shooting he had been engaged in a quarrel with his wife—the defendant's mother—but it was *held*, evidence of the previous conduct of the deceased towards his wife was not admissible as tending to show whether the shooting was accidental, or in self-defence, or was willfully and maliciously done. *Hirschman v. The People*, 568.

PREVIOUS GOOD CHARACTER OF ACCUSED.

9. *Of evidence in respect thereto—and its effect.* On the trial of one for manslaughter, the defendant is allowed to give evidence only of his previous *general* character in regard to peace and quiet, etc., and not proof of particular transactions in which he may have been previously concerned. The witness can not be called upon for his personal knowledge of the prisoner's acts and conduct. *Ibid.* 568.

10. On a charge of crime the previous good character of the accused is but a circumstance to be considered by the jury, in connection with all the other evidence, in determining the question of guilt or innocence. If the evidence of guilt is complete and convincing, when considered with the evidence of previous good character, the evidence of good character will not avail. *Ibid.* 568.

OF THE DEFENDANT AS A WITNESS.

11. *Credibility.* See WITNESSES, 5.

CROSS-ERRORS.

OMISSION TO ASSIGN IN APPELLATE COURT.

1. *Effect upon the right of the party on error in the Supreme Court.* An affirmance of a judgment in the Appellate Court on appeal or writ of error, where the appellee or defendant in error files no cross-errors, is not conclusive on the latter, and he may, on writ of error from this court, assign errors, and have the original judgment reversed. *Wiggins Ferry Co. v. The People ex rel. Weber*, 448.

DEBTOR AND CREDITOR.

OF A COMPROMISE BETWEEN THEM.

1. *Whether fraudulent—omission by debtor to inform the creditor of a gift he had previously made.* *Jackson v. Miner et al.* 550. See FRAUD, 1.

FRAUDULENT CONVEYANCES.

2. *As affecting rights of creditors.* See FRAUDULENT CONVEYANCES, 1, 2.

DECREE.

DENIAL OF RIGHT BY IMPLICATION.

1. All such rights, or claims of right, as are submitted by a complainant for adjudication that are not allowed, confirmed or recognized by the decree, are by implication denied, and while such decree remains

DECREE. DENIAL OF RIGHT BY IMPLICATION. Continued.

in force such rights will be barred, whether given by law or by implication. *Doane v. Walker*, 628.

HOW FAR CONCLUSIVE.

2. If a court has jurisdiction of the persons of the parties and of the subject matter of the suit, its decrees will be conclusive on all parties concerned; and the title to property acquired on a sale under a decree in such a case will be valid, notwithstanding irregularities may have intervened in the proceedings. *Allman et al. v. Taylor et al.* 185.

WHO MAY BE BOUND BY A DECREE.

3. *When decree binding on persons not parties, and when not.* See PARTIES, 1, 2, 3.

DEEDS.

DELIVERY OF DEEDS. See CONVEYANCES, 4 to 8.

DELIVERY.**PLACE OF DELIVERY.**

Under contract of sale. *Devine v. Edwards*, 138. See CONTRACTS, 1.

DELIVERY OF DEEDS. See CONVEYANCES, 4 to 8.

DEMURRER TO EVIDENCE. See PRACTICE, 10.

DESCENTS.**AS TO REAL ESTATE IN THIS STATE.**

1. *The laws of this State govern in the descent of real property situated in this State.* *Keegan v. Geraghty et al.* 26.

ADOPTED CHILD.

2. *As to his right of inheritance—from whom.* The rights of inheritance acquired by an adopted child under the laws of another State, where he was adopted, will be recognized and upheld in this State only so far as they be not inconsistent with our laws of descent, so that if such child can not take by descent by our statute, it can not take at all, no matter what may be the law of the State where the adoption was made. *Ibid.* 26.

3. Under our statute for the adoption of children, an adopted child can take by descent only from the person adopting, and not from the lineal or collateral kindred of the adopting parent. Therefore such child can not, by inheritance, take from a child of the adopting parent born in lawful wedlock, the adopted child not being a brother or sister in fact. *Ibid.* 26.

4. *Statute to be strictly construed.* As against an adopted child the statute should be strictly construed, as being in derogation of the general

DESCENTS. ADOPTED CHILD. *Continued.*

law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial. *Keegan v. Geraghty et al.* 26.

DESCRIPTION—BOUNDARIES.

MISTAKE IN SURVEYOR'S CERTIFICATE.

1. *Controlled by monuments.* A mistake in the surveyor's certificate, attempting to give a description of the land actually surveyed and platted into town lots, describing the town as being on a different quarter of the proper section, does not render the survey and subdivision of the property into lots and blocks uncertain, and for that reason void, when the monuments planted by the surveyor at the time of the survey, fix the boundaries of the survey definitely and certainly. *People v. Stahl*, 346.

2. It is well settled law that the monuments established by a surveyor at the time of making the survey, will always prevail over written descriptions, when a contradiction exists. *Ibid.* 346.

SUFFICIENCY OF DESCRIPTION.

3. *Generally.* Any description of land or a lot, for purposes of taxation, by which it may be identified by a competent surveyor with reasonable certainty, either with or without extrinsic evidence, is sufficient. *Ibid.* 346.

AS TO LAND EMBRACED IN A CONTRACT.

4. *Lack of certainty—contract void.* A contract was as follows: "This is to certify to an agreement between D. B. and myself, that he is to bid off the land now advertised by myself, and sold on Monday next, and give up same on following terms, namely: to have two acres at spring, each side of spring, one to make a square; and also to have use of surplus water flowing from springs west of road; and two acres south of spring on hill, to be used for waterworks, and to be in my use until he needs it," signed "A. H. Ott" and "D. Brix, M. D.,"—when the facts were that Ott had never advertised the same for sale, but it was advertised for sale by another person for a debt due one Y, under a trust deed, and it appeared there were several springs on the land advertised, and that Brix failed to bid off such land, when it was struck off to Ott: *Held*, the contract was too vague and uncertain, both as to the land out of which the parcels were to be taken and retained, and as to their location and shape or form, to be specifically enforced. *Brix v. Ott*, 70.

DIVORCE AND ALIMONY.

ALIMONY.

1. *Extent of allowance—and decreeing husband's land to wife.* On cross-bill by a wife for a divorce from her husband, it appeared that the husband's real and personal property was worth about \$26,000. On granting the divorce the court gave the wife, for herself and two chil-

DIVORCE AND ALIMONY. ALIMONY. *Continued.*

dren, as alimony, \$3000, to be paid in ninety days, and a like sum to be paid in eighteen months, and by the decree gave her the title in fee to 160 acres of his land. On petition of the husband for a modification of the decree, it appeared that he had paid a judgment to the wife's father of \$1390 for her support; that he had paid the first \$3000, and the other \$3000 had been paid by a sale of 240 acres of his land, which sale had passed redemption; that the balance of his lands was incumbered by a claim of dower held by his mother, and that the income derived from them was small, and that the value of the lands had decreased thirty per cent since the final decree; and that none of his property had been derived from or through his wife. The petition was denied: *Held*, that it was error to decree the wife the quarter section of land, and that the \$6000 allowed by the court was quite as large a sum as should have been allowed. *Robbins v. Robbins*, 416.

2. Where the husband has obtained no money or property through his wife, and she has contributed nothing to make the property, the court is not justified, on any principle, in decreeing to the wife the title in fee to a portion of his lands, on a divorce. It might be otherwise if the wife, at the time of the marriage, or during coverture, acquired money which passed into the hands of the husband, and he invested it in real estate. *Ibid.* 416.

DOWER.

WIDOW'S QUARANTINE.

1. *How lost.* The right of a widow, under sec. 27 of the Dower act of 1845, to retain possession of the dwelling house in which her husband most usually dwelt next before his death, together with the out-houses and plantation, etc., until her dower be assigned, like other rights may be transferred, lost, or forfeited by her own acts, and when it becomes the subject of litigation in a court having jurisdiction to pass upon it, the owner of such right will be concluded by the adjudication with respect to it, precisely in the same way, and to the same extent, as in any other case where property rights have become the subject of judicial determination. *Doane v. Walker*, 628.

2. *In the particular case—where dower was not finally fixed as to all the lands.* In this case a widow filed her bill for an assignment of dower in several distinct parcels of land, claiming the right of occupancy of the homestead premises until her dower should be assigned in all the lands. The decree in the trial court allowed dower in all the property, but was silent as to the right of the widow to occupy the homestead premises until her dower should be irrevocably fixed with respect to the other lands. On appeal, the decree, in so far as it allowed dower in the homestead premises, was affirmed, but in respect to the other parcels it was reversed. It was *held*, the effect, by implication, of the adjudication in the trial court as to dower in the homestead place, being silent as

DOWER. WIDOW'S QUARANTINE. Continued.

to the widow's right of continued occupancy thereof, or quarantine right, until the final disposition of the question of dower in the other property, was to deny her that right, and it was gone. *Doane v. Walker*, 628.

3. *On petition by administrator to sell land to pay debts—silence of the widow as to quarantine right—estoppel.* Where the widow, in her answer to an administrator's petition for leave to sell certain real estate to pay the debts of his intestate, fails to interpose any claim to retain possession after the assignment of her dower therein until it is finally settled as to other tracts, and the sale is ordered to be made subject to her dower, she will be estopped by the proceeding from setting up such claim as against the purchaser at the administrator's sale. *Ibid.* 628.

4. *On severance of title to lands.* Where a part of the lands of an intestate, in which his widow is entitled to dower, has been sold by the administrator of the estate to pay debts, after the assignment of the widow's dower therein, this will amount to a severance of the title, and the purchaser will take the land bought by him subject only to the dower therein as fixed by the decree allowing it, unaffected and freed from any alleged rights of the widow depending upon claims against any of the other lands on account of dower, and he can not be kept out of possession until dower is assigned in the other lands in which he has no interest. *Ibid.* 628.

DRUGGISTS.**SALE OF INTOXICATING LIQUORS.**

Without license—prohibited. See **INTOXICATING LIQUORS**, 1.

EJECTMENT.**CONDITIONS TO A RECOVERY.**

1. *There must be an unlawful entry and unjust detention.* The action of ejectment proceeds for the possession of premises, claiming that they have been unlawfully entered and unjustly withheld, and facts which go to disprove these, make a legal defence. *St. Louis, Alton and Terre Haute Railroad Co. v. Karnes*, 402.

ELECTIONS.**TOWN MEETING—AS DISTINGUISHED FROM AN "ELECTION."**

1. *As applied to an election to "be held and conducted, and returns thereof made, as is provided by the Township Organization law in towns organized under said law."* *Chicago and Iowa Railroad Co. et al. v. Mallory et al.* 583. See **MUNICIPAL SUBSCRIPTIONS AND BONDS**, 1; **TOWN MEETING**, 1.

CONTESTED ELECTION—AS TO MAYOR OF CITY.

2. *County court has jurisdiction.* *Winter v. Thistlewood*, 450. See **JURISDICTION**, 5.

EMINENT DOMAIN.

CONDEMNATION OF RIGHT OF WAY.

1. *Sufficiency of petition as to inability to agree with owner.* An allegation in a petition by a railway company to condemn land for a right of way, that the petitioner "has not been able to acquire the title, nor the right of way over the land, by purchase or by voluntary grant from" the defendants, though not formal, is substantially sufficient under the statute, as showing an inability to agree as to the compensation to be paid. *Booker v. Venice and Carondelet Ry. Co.* 333.

2. *As to condemning strip exceeding one hundred feet in width for right of way of railroad—waiver of objection.* A judgment condemning a strip of land one hundred and twenty feet wide for a right of way for a railway will not be reversed because the land condemned exceeds one hundred feet in width, where it does not appear from the record that the additional twenty feet was not necessary, by the pleadings, and no such objection was raised before the court below, either by demurrer or reasons assigned in arrest of judgment. The objection not being made below, must be considered as waived. *Ibid.* 333.

3. *Measure of compensation to lessee of premises.* In a proceeding to condemn land for a right of way, the jury allowed a lessee of the land taken, whose lease had three years to run, the amount of rent he was to pay per acre for the whole term, as to the land condemned, while he contended that for gardening purpose it might yield much more. There was no proof that it would be used for such purpose, and no other damages shown, and it appeared that the lessee had the option of terminating the lease at any time: *Held*, that the verdict would not be set aside as against the evidence, and that future profits of the land taken were too uncertain to be depended upon as a measure of damages. *Ibid.* 333.

4. *Lawfulness of possession obtained under the act—before and after a reversal.* After an appeal had been prayed and allowed in favor of the land owner, in a proceeding to condemn his land for a right of way, in which his compensation had been fixed by a jury, the railroad company seeking the condemnation paid the sum found by the jury to the county treasurer, and gave the proper bond, as required by the statute, to give a right to enter upon the land. Before the judgment in the proceeding was reversed, on the appeal to this court, the land owner accepted the money deposited with the treasurer, which he never offered to return, and without causing the remanding order to be filed and the cause redocketed for further proceedings, brought ejectment against the lessees of the railroad company for the land used as a right of way: *Held*, that as the possession, when first taken, was lawful, the mere reversal of the judgment without taking any further steps, or returning or offering to return the money paid, did not render the continuance of such possession unlawful, and that the action could not be maintained. *St. Louis, Alton and Terre Haute Railroad Co. v. Karnes*, 402.

EMINENT DOMAIN. CONDEMNATION OF RIGHT OF WAY. Continued.

5. The reversal of a judgment condemning land for a right of way, on appeal by the land owner, will not divest the possession of the corporation procuring the condemnation lawfully obtained, or render its continuance unlawful. It has no effect whatever upon the right of possession. In such case, if the land owner deems the compensation allowed and paid to him as insufficient, he should, within two years after the reversal, have the cause remanded and docketed, giving the proper notice, and have another trial. If he fails to do so, and retains the sum paid him, he may be regarded as abandoning any claim for further compensation. *St. Louis, Alton and Terre Haute Railroad Co. v. Karnes*, 402.

BENEFITS TO OTHER PROPERTY.

6. *Not properly a set-off to damages.* Where a lot is divided by a street laid through the same, benefits to one part of the property can not be set off against damage to the other part on the other side of the street by the laying of railroad tracks in the street so as to prevent access to the same, and excluding ordinary travel on the street. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157.

ERROR.

ERROR WILL NOT ALWAYS REVERSE. See **PRACTICE IN THE SUPREME COURT**, 6, 7, 8.

ESTATE.

CHARACTER AND QUALITY OF AN ESTATE IN LAND. See **REAL PROPERTY**, 1, 2, 3.

ESTOPPEL.

SUBSCRIBING TO STOCK OF CORPORATION IN BLANK.

1. *Party estopped to deny right of others to supply the blank as to amount.* *Jewell et al. v. Rock River Paper Co. et al.* 57. See **CORPORATIONS**, 2.

WIDOW'S QUARANTINE.

2. *Estoppel—by failure to set up the claim.* See **DOWER**, 3.

EVIDENCE.

PAROL EVIDENCE.

1. *To show a deed is a mortgage.* It is well settled in our courts that parol evidence is admissible in equity to show that a deed in form absolute was intended as a mortgage. *Wright et al. v. Gay et al.* 233.

2. *To show existence of a trust.* Where a person at a sale of land becomes the purchaser under the promise to hold for the benefit of the children of the former owner upon being repaid the sum advanced by him, this is sufficient to raise a trust in favor of such children on the ground of fraud, and this may be proved by parol. *Ibid.* 233.

EVIDENCE. *Continued.*

SECONDARY EVIDENCE.

3. *As to contents of lost instrument—of the diligence required.* While it may be true that every one into whose hands a writing has been traced should be produced before admitting secondary evidence of its contents, yet where the evidence shows the instrument to have been destroyed, no further proof is required in order to admit such evidence. *Rhode et al. v. McLean*, 467.

4. *Sufficiency of proof of a copy.* On the question of the admissibility of a copy of an appeal bond in evidence, in a case where the principal had obtained and destroyed the original, the clerk of the court testified that he looked at the bond when handed him, and saw it was in the sum required by the order of the court, and that it was signed by the defendants, before he approved the same; that he could not swear whether the copy shown him was a copy or not; that he did not read the original bond through; that he only read far enough to see that it was an appeal bond in the case, and that the amount conformed to the order of the court, and who the sureties were, and that they were good; that his recollection was that the bond handed him by the defendant was on a printed blank; that the copy shown him was on a blank such as he generally used in the office; and that the defendant got a blank from him to fill up, in the case in which the appeal was taken: *Held*, that the proof was sufficient that the copy exhibited was in substance a copy of the appeal bond. *Ibid.* 467.

5. *As to the grade of evidence allowable.* It is a familiar rule that no evidence will be received of a fact which, from its very nature, shows there might be better evidence to such fact, without first satisfactorily accounting for the absence of the higher order of evidence. The counterpart of this rule is, that the law is satisfied where the fact sought to be established has been proven by the best evidence of which, in its nature, it is susceptible. *Anderson et al. v. Irwin*, 411.

DESTRUCTION OF WRITTEN EVIDENCE.

6. *Degree of proof required against one who destroys written evidence.* Where one deliberately destroys, or purposely induces another to destroy, a written instrument of any kind, and the contents thereof subsequently become a matter of judicial inquiry between the spoliator and an innocent party, the latter will not be required to make strict proof of the contents of such instrument in order to establish a right founded upon it. In such case, slight evidence will suffice. *Ibid.* 411.

7. *So, where a will duly executed and attested was destroyed*, with the connivance of a part of the heirs of the testator, and no copy appearing to be in existence, in a suit by a devisee not a party to such destruction, it was *held*, that the latter was only required to show, in general terms, the disposition which the testator made of his property by the instrument, and that it purported to be his will, and was duly attested by the requisite number of witnesses. *Ibid.* 411.

EVIDENCE. *Continued.*

EVIDENCE AS TO SANITY OF TESTATOR.

8. *Whether necessary.* On a bill to establish a will destroyed after the testator's death, proof of the sanity of the testator is not indispensable in the absence of any proof that he was not in his sound mind, and in such case the disposition made by him of his property may of itself afford sufficient evidence of his sanity. *Anderson et al. v. Irwin*, 411.

OPINIONS OF WITNESSES.

9. *As to matters not scientific, etc.* Where a copy of the rules of a railway company, showing what was required of switchmen and other servants, was admitted in evidence, in an action for injuries alleged to have resulted from the negligence of the defendant company, and where what work the deceased switchman was required to do, as well as the means at his hand with which it could be accomplished, was distinctly shown, and where the main and side-tracks, and their distance from each other, and the street crossings and yards, with all the other facts deemed necessary, were given in evidence, it was *held* no error to refuse the testimony of other switchmen, to show that in their opinion it was not necessary for the deceased to have been where he was when he received the injury, or to have passed along the track, and that there was space enough to properly perform his duties without going upon such track, etc., as the jury were as competent, from the facts shown, as the witnesses, to form an opinion on the questions proposed. *Pennsylvania Co. v. Conlan*, 93.

10. As to matters which do not so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them, the opinions of witnesses, though experts, are not admissible. *Ibid.* 93.

11. *As to use, etc., of highway.* Whether a thoroughfare is used, and how used, and worked upon by public authorities, or abandoned, depends upon certain facts only, and not on the opinions of witnesses. So, also, the use made of a street by a railroad company is an existing fact, while the use that ought to be made of it is a mere matter of opinion. Witnesses not experts should be allowed to testify only to facts, and not to give their opinions, and leave the jury to draw conclusions from the facts. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157.

12. In a suit by a lot owner against a railroad company to recover damages to his lot, caused by the use of a street fronting the same, for railroad tracks, and thereby preventing ingress and egress to and from the same, etc., the statements of the officers of the road as to the intended future use of the street are not admissible in behalf of the company, as being hearsay, and a matter of opinion. An actual direction as to its use might be proper evidence in such case. *Ibid.* 157.

EVIDENCE. Continued.**IN ACTION TO RECOVER FOR NEGLIGENCE.**

13. *Evidence to show rate of speed and control of train.* Testimony showing how far a train of cars ran after striking a person, is competent evidence in a suit against the railroad company to recover damages for causing the death of the person struck, as tending to show the train was running at a greater speed than allowed by ordinance of the city in which the accident occurred, and also that the train was not under proper control. *Pennsylvania Co. v. Conlan*, 93.

14. *Limiting question of speed to particular train.* In a suit against a railroad company to recover damages for striking a person by a train of cars through negligence, a witness had been speaking of the train that struck the deceased. He was then asked, "state to the jury, in your opinion, how fast the train was going," which was claimed to be objectionable, as not being limited in time or to the particular train: *Held*, that the objection was not tenable. *Ibid.* 93.

15. *Kind of employment of party injured is material.* In a suit against a railroad company to recover for the killing of a person through negligence, while engaged in his duty as a switchman, the nature of his employment at the time of the injury is material on the question whether he was exercising due care. *Ibid.* 93.

BANKER'S BOOKS.

16. The entries in the books of a bank being its own declarations in writing, are competent evidence against the bank and its officers of the state of a party's account, and of moneyed transactions with him, and neither the bank, nor its president succeeding to its rights and equities, can be heard to find fault with the manner in which the books were kept. *Loewenthal v. McCormick et al.* 143.

USE OF TRUST FUNDS—RECITAL IN DEED.

17. The recital in a deed of a husband, conveying real estate to the trustee of his wife, that the wife had directed a portion of the proceeds of the sale of her stocks by the trustee to be invested in the same real estate, instead of stating that the investment had been made, is *prima facie* evidence against the husband, and those claiming under him, that a portion of the proceeds of such bank stock was invested in such land, and the use of the deed, as evidence of this fact by the *cestuis que trust* of the bank stock, or its proceeds, does not make such deed binding and conclusive upon them for all purposes. *Breit et al. v. Yeaton et al.* 242.

CONDITION PRECEDENT TO POWER TO CONVEY.

18. *Effect of recital in deed in respect thereto—as evidence.* See **TRUSTS AND TRUSTEES**, 10.

MASTER'S REPORT.

19. *In a proceeding to charge a purchaser of land sold under a decree of foreclosure with the difference between his bid and the sum bid on a re-sale, the master's report will be prima facie evidence, under*

EVIDENCE. MASTER'S REPORT. *Continued.*

the statute, of what it is by law required to contain. But such reports must be introduced in evidence, and preserved in the record in the usual mode, to authorize a monetary decree against the alleged purchaser. *Thrifte v. Fritz*, 457.

ADMISSION OF A PRINCIPAL.

20. *As against his surety.* The admission of the principal in an appeal bond that the bond was destroyed, he having taken it from the clerk's office and never having returned it, is evidence of the fact of its destruction, not only as against himself, but against his co-obligors as well. *Rhode et al. v. McLean*, 467.

ON CROSS-EXAMINATION.

21. *As to character of transaction between commission merchant and his customer—on margins.* In a suit by a commission merchant or broker to recover of a person for whom a purchase was made, for loss on a re-sale, for want of putting up of a further margin, the defendant will have the right, on cross-examination, to inquire when, where, and in what manner the purchase was made for him, and whether the plaintiff has settled the purchase, and if so, what was paid, to whom, and the manner it was paid, to show whether the mode of dealing was fair, and free from fraud and injustice or wrong to him. *Oldershaw et al. v. Knowles*, 117.

22. A commission merchant has no right to adopt methods in making purchases for his customers that he may refuse to explain, or that are so intricate or tortuous that they are incapable of being explained to the full comprehension of an ordinarily intelligent jury. *Ibid.* 117.

23. In a suit where the plaintiff claims that he made a contract for lard for the defendant, for future delivery, and that in consequence of the defendant's failure to indemnify him against loss he was compelled to sell the lard, and pay the loss to the person from whom the purchase was made, and that he has paid and settled the loss, and has the right to recover the same of the defendant, the latter will have the right to learn the particulars of the entire transaction, on the trial. *Ibid.* 117.

EVIDENCE UNDER THE GENERAL ISSUE.

24. *In assumpsit.* See PLEADING AND EVIDENCE, 7.

CREDIBILITY OF WITNESS.

25. *Effect of contradictory statements.* See WITNESSES, 3.

AS TO SUBSCRIPTION TO STOCK OF CORPORATION.

26. *As to evidence that requisite amount has been subscribed.* *Jewell et al. v. Rock River Paper Co. et al.* 57. See CORPORATIONS, 1.

EVIDENCE IN CRIMINAL CASES.

27. *Generally.* See CRIMINAL LAW, 2, 3, 7 to 10.

BURDEN OF PROOF.

28. *In respect to validity of municipal bonds.* See MUNICIPAL SUBSCRIPTION AND BONDS, 2.

EXCEPTIONS.

WHETHER NECESSARY.

1. *Where an error appears in the record proper*, as made up by the clerk, no exception to the judgment of the court is necessary; but if the ruling is upon matters which can only appear in the record by a bill of exceptions, it must be shown that the erroneous ruling was excepted to at the time. *Wiggins Ferry Co. v. The People ex rel. Weber*, 446.

2. So where the delinquent list filed by a collector on application for judgment for taxes, shows that a greater rate of city taxes has been levied against the property than is allowed by the city charter, no exception is necessary to the judgment of the county court for such excessive rate of taxes. It is sufficient that such defence was made in the written objections. The delinquent list is in the nature of a pleading, serving the office of a declaration in the case, stating what is the cause of action. *Ibid.* 446.

EXCHANGE OF LANDS.

WHAT TO BE SO CONSIDERED.

As affecting right of homestead. See HOMESTEAD, 8, 9.

FEES.

FEES OF CLERKS OF CIRCUIT COURTS.

1. *In counties of third class—where several defendants plead jointly.* Under sec. 33, chap. 53, of the Revised Statutes, relating to Fees and Salaries in counties of the third class, if one of several defendants, acting separately from the others, wishes to enter his appearance, or to plead, answer or demur, in his own behalf, he must, before doing so, pay a fee to the clerk of \$1.50; but when two or more defendants wish to enter their appearance, or to plead, answer or demur jointly, they are to jointly pay \$1.50, and not each to pay that sum. *People ex rel. v. Gross*, 343.

FORMER ADJUDICATION.

IN WHAT MANNER TO BE PRESENTED.

1. *As to defence set up in answer in chancery.* If the matters set up in an answer as a defence have been previously adjudicated, it should be set up by plea or replication, upon which issue can be taken, so as to give the defendant an opportunity to present any evidence he may have on the subject. It can not be taken by exception to the answer. *Thrifte v. Fritz*, 457.

AS TO HOMESTEAD RIGHT.

2. Where in a suit in which the heirs and devisees of a deceased owner of land, occupied by him as a homestead, are parties, the premises are set off to the widow of the deceased as her homestead, this is an adjudication that up to that time she had not lost her homestead by abandonment. *Plummer v. White*, 474.

FORMER DECISIONS.

ABANDONMENT OF HOMESTEAD.

1. *By accepting lease of premises.* Where the owner of land sold on foreclosure against him, sells his interest to another, who procures an assignment of the certificate of purchase, and pays the balance of the price to such owner, and the latter, after a deed is made on the foreclosure sale, takes a lease of the person so purchasing, the accepting of such lease will be a surrender and abandonment of the premises, within the meaning of the Homestead act, and the former owner will have lost his homestead, though not properly released in the mortgage under which the sale was made. What was said in *Booker v. Anderson*, 35 Ill. 66, as to the effect of taking a lease under similar circumstances, can have no bearing now, as the statute under which that decision was given did not contain the clause found in the present statute, "or possession is abandoned, or given pursuant to the conveyance."* *Winslow et al. v. Noble et al.* 194.

AS TO CORPORATIONS FOR LOANING MONEY.

2. *Policy of the law as to their creation.* That part of the opinion of the court in *United States Mortgage Co. v. Gross*, 93 Ill. 483, holding that it was a part of the policy of the law of this State, as shown by sec. 1 of the general Incorporation act of 1872, that corporations should not be formed in the State for the business of loaning money, is overruled. *Stevens v. Pratt et al.* 206.

FOREIGN CORPORATIONS.

3. *Loaning money in this State.* This court also erred in that case in holding that the first sentence of sec. 26 of the general Incorporation law of 1872, manifests a policy that foreign corporations were to have no right to loan money in this State. *Ibid.* 206. See CORPORATIONS.

REDEMPTION FROM EXECUTION SALES.

4. *May be of an undivided interest.* Under the present statute one of several joint owners of land sold under execution, or decree of foreclosure, may redeem whatever interest he has in the same, and so also a judgment creditor of a joint owner may redeem the interest of his debtor. The ruling on this question in *Durley v. Davis*, 69 Ill. 133, that a judgment creditor of one of several persons owning land as tenants in common, could not redeem from an execution sale of the entire premises, as to the interest of his debtor, by paying a proportionate part of the amount for which the land was sold, is no longer the law, under sec. 26, chap. 77, Rev. Stat. 1874, p. 625. *Schuck v. Gerlach*, 338.

FORMER RECOVERY.

IN RESPECT TO ENTIRE AND SEPARATE CAUSES OF ACTION.

Effect of a separate recovery in such cases, respectively. See ACTIONS, 7 to 10.

*The case of *Buck v. Conlogue*, 49 Ill. 391, upon the same question, seems to rest upon *Booker v. Anderson*.

FRAUD.

COMPROMISE BETWEEN DEBTOR AND CREDITOR.

1. *Omission to state facts.* A compromise by a debtor with his creditors, by which he paid fifty cents on the dollar of his indebtedness, and procured releases, will not be set aside, in the absence of proof of any false representations or fraud except his omission to inform his creditors that he had held the title to certain houses and lots, and had made a gift of them to another. *Jackson v. Miner et al.* 550.

IN CHANGING ORGANIZATION OF CORPORATION.

2. *Fraudulent arrangement will not affect rights of creditors.* *Jewell et al. v. Rock River Paper Co. et al.* 57. See CORPORATIONS, 5.

ON SUBSCRIPTION TO STOCK OF CORPORATION.

3. *Private arrangements between subscription agent and subscriber—not binding upon creditors.* Same title, 3, 4.

FRAUDULENT CONVEYANCES.

AS TO A GIFT MADE BY A DEBTOR.

1. *Whether valid as to then existing creditors.* The purchase of property by a man, for a woman, in his own name, and its conveyance to her without any pecuniary consideration, and in view of illicit intercourse with her, past and expected, will not be sustained as against the claims of creditors for debts owing at the time of the grant, which he at that time was unable to pay. *Jackson v. Miner et al.* 550.

2. *As to subsequent creditors.* Where property was bought for another as a gift, and the person to whom the gift was made put in possession of the same in 1870, and the conveyance made to her and recorded in December, 1871, at which times the party making the purchase and gift was solvent and in good credit, it was held, that the gift could not be set aside by creditors for debts accruing to them in 1873 and 1874. *Ibid.* 550.

FREEHOLD.

WHETHER INVOLVED IN SUIT.

As affecting right of appeal from trial court directly to the Supreme Court. See APPEALS AND WRITS OF ERROR, 9, 10.

GIST OF AN ACTION.

WHAT CONSTITUTES. See ACTIONS, 1.

GOOD CHARACTER.

AS TO PERSONS ACCUSED OF CRIME.

Proof of previous good character. See CRIMINAL LAW, 9, 10.

GOOD WILL.

OF AN INSURANCE COMPANY.

As assets of the company. See CORPORATIONS, 19.

GUARANTY.

WHEN LIABILITY ACCRUES.

1. A party guarantied the payment of a promissory note and coupons before their delivery, the note running for five years, with interest payable semi-annually, but containing a clause that if default should be made in the payment of principal or interest, or any part thereof, for the space of ten days, then, on the election of the holder, the whole note and all arrears of interest should become due, and the whole was declared due for default in the payment of interest, and the guarantor, who was also trustee in a deed of trust given to secure the note, was authorized to sell the mortgaged premises for the full amount of the debt, which he did, but struck the property off to the creditor without any authority to do so; the creditor refused to accept the deed made by the trustee, and assigned the note to the plaintiff, who brought suit in his own name upon the guaranty: *Held*, that the plaintiff was entitled to recover. *Ellsworth v. Harmon*, 274.

GUARDIAN AD LITEM. See INFANTS, 5, 6.

GUARDIAN AND WARD.

GUARDIAN LEASING WARDS' LAND.

1. *As to approval by probate court.* A lease of property by a widow in her own right, and as guardian for her minor children, can not be avoided by the lessee for want of its approval by the probate court. A lease executed by a guardian in behalf of his wards for a term not exceeding their majority, is valid, unless disapproved by the probate court. The approval of that court is not essential to the validity of the lease. *Field et al. v. Herrick et al.* 110.

HIGHWAYS.

USE OF STREETS, ETC., FOR RAILROAD PURPOSES.

1. *Extent of the use granted.* A grant of power to a railroad company to construct its road upon or across a road or highway which the route of its road may intersect, the corporation to restore the road or highway to its former state, or in a sufficient manner not to impair its usefulness, is equivalent to allowing a joint use of the highway by the company with the public, protecting its use as an ordinary highway against any impairment. It does not authorize a use to the exclusion of ordinary travel thereon. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157.

2. *Power of county or town officers to grant use of street or highway for railroad purposes—under act of 1849.* Section 26 of the general Railroad act of 1849, authorizing the county or town officers having charge of lands belonging to their county or town to grant the right of way over the same to railroad corporations, has application only to lands which belong to counties and towns as owners thereof, and not to lands

HIGHWAYS.**USE OF STREETS, ETC., FOR RAILROAD PURPOSES. Continued.**

in which they hold the nominal title only, for a prescribed public use, such as for a street or highway. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157.

3. *Powers of commissioners of highways in that regard.* The commissioners of highways of a town, having no title to an avenue or public highway, are powerless to grant the same to a railroad company by deed, so as to pass an exclusive right to its use, and a deed by them attempting to grant such right is void. *Ibid.* 157.

4. *Effect of act of 1861 as to right of way of Pittsburg, Ft. Wayne and Chicago Railroad Company.* The second section of the "Act to perfect the title of the purchasers of the Pittsburg, Ft. Wayne and Chicago railroad, and to enable them to form a corporation," approved February 8, 1861, has no reference to the mode of acquiring the right of way, and does not have any retroactive operation to validate titles to right of way. *Ibid.* 157.

5. *Right of action to lot owner for improper use of street for railroad purposes.* A lot owner has a right of action to recover damages to his lot from the unauthorized laying of additional railroad tracks in the street fronting his lot, whereby the use of the street for all ordinary purposes of a highway is destroyed, and access to the lot is cut off, and for the creating of a nuisance by allowing stock cars to stand in the street adjoining the lot. *Ibid.* 157.

HOMESTEAD.**AS TO THE CHARACTER OF THE EXEMPTION.**

1. Under the Homestead law of 1873, "all right and title" which the head of the family has in the premises which constitute his homestead, is exempted from forced sale for the payment of his debts, or other purposes. It is not the mere right of occupancy, but it is the lot or ground occupied as a residence that is exempted. *Hartman et al. v. Schults et al.* 437.

2. Where the homestead premises do not exceed in value \$1000, there can be no valid sale of the property itself on execution or decree for the payment of debts or other purposes, and this exemption, on the death of the householder, is continued in force as to his widow and children, precisely as held by him. *Ibid.* 437.

EXEMPT FROM ADMINISTRATOR'S SALE.

3. No sale can be rightfully made of the homestead by the administrator of the deceased householder to pay his debts, when the property does not exceed in value \$1000, until the exemption in favor of the widow and minor children has been in some mode terminated; and if such a sale is made, a court of equity has the power to set the same aside at the instance of the homestead occupant. The homestead, when not

HOMESTEAD. EXEMPT FROM ADMINISTRATOR'S SALE. Continued.

exceeding \$1000 in value, can not even be sold subject to the homestead right. *Hartman et al. v. Schultz et al.* 437.

PURCHASE MONEY.

4. *What indebtedness is for purchase money.** Where a party exchanged land on which there was an incumbrance, for another tract, agreeing to discharge the incumbrance, and taking a deed in which a lien was reserved to secure the performance of such agreement, and afterwards borrowed money with which to relieve the land so given by him in the exchange, from the incumbrance, giving a mortgage on his own land to secure its repayment, it was *held*, that the money so borrowed was in no sense purchase money of the land mortgaged by him. *Winslow et al. v. Noble et al.* 194.

AS TO LIEN OF COLLECTOR'S BOND.

5. *Whether homestead right affected thereby.* A homestead not exceeding \$1000 in value, owned and occupied by a county collector as his residence, is not subject to the statutory lien of his bond; but if it exceeds that value, then the excess, but only the excess, is subject to such lien. *Crawford et al. v. Richeson et al.* 351.

6. *Whether lien attaches before the homestead is occupied.* Where, after the recording of a collector's bond, which is declared a lien on all his lands, he purchases land for a homestead, and within a reasonable time thereafter moves upon and occupies it as such, the land so bought will be considered as becoming his homestead from the time of acquiring the title, and the lien will not attach, although a short space of time may have intervened between its purchase and occupancy. *Ibid.* 351.

MANNER OF ASSERTING HOMESTEAD RIGHT.

7. Where a bill to enforce a lien of a collector's bond on land owned and sold by him, before the bond was discharged, alleged that the bond was a lien on the land, which the answer simply denied, it was *held*, that under the issue thus formed evidence of a homestead right was competent, as going to show the bond was never a lien on the land. *Ibid.* 351.

IN CASE OF EXCHANGE OF LANDS.

8. *And what amounts to an exchange.* During the pendency of a statutory lien under a collector's bond, the collector acquired a tract of

* Further as to claim for purchase money being protected as against the right of homestead, and what constitutes purchase money: *Weider v. Clark*, 27 Ill. 251; *Miller v. Marckle*, id. 402; *Eyster v. Hathaway*, 50 id. 521; *Best v. Gholson*, 89 id. 465; *Allen v. Hawley*, 66 id. 164; *Austin v. Underwood*, 37 id. 438; *Magee v. Magee*, 51 id. 500; *Bush v. Scott*, 76 id. 524.

Money borrowed of a third person and invested in the purchase of land, is not purchase money, within the meaning of our Dower law. *Jenerson v. Garden*, 29 Ill. 199.

The second section of the Homestead act of 1851 was intended to protect the vendor's lien. *Phelps v. Conover*, 25 Ill. 314.

HOMESTEAD. IN CASE OF EXCHANGE OF LANDS. *Continued.*

land as his homestead, which he exchanged for another, occupying the latter as a homestead, it was *held*, on bill by the sureties of the collector, who had been compelled to pay on his default, to be subrogated to the lien and have these lands sold under the lien, that in consideration of the equitable rights of purchasers from the collector, the sureties should be subrogated as to only one of the two tracts, viz: the tract last acquired, and as to it only as to the excess in value above \$1000. *Crawford et al. v. Richeson et al.* 351.

9. But where a house and two acres of land not subject to the lien, as being of less value than \$1000, together with twenty-eight acres of land subject to the lien, were exchanged for one hundred and twenty acres of other land and \$1000 in money, it was *held*, that the rule could not be applied, it being no exchange proper, in the legal sense. *Ibid.* 351.

ENFORCING HOMESTEAD RIGHT—IN EQUITY.

10. *The party must do equity.* Where the owner of land which had been sold on foreclosure of a mortgage which failed to release the homestead, induced another to purchase the land by taking up the certificate of purchase, the time of redemption having nearly expired, and pay him the balance of the purchase money, \$400, and accepted a lease from such purchaser, but learning of the defect in respect to the release of the homestead refused to surrender possession to the purchaser, and filed his bill to enjoin the recovery of possession by forcible detainer, without paying back the \$400 received by him, it was *held*, that under the maxim, he who seeks equity must do equity, and come with clean hands, the complainant was not entitled to the relief sought. *Winslow et al. v. Noble et al.* 194.

FORMER ADJUDICATION.

11. *Establishing homestead right.* Where in a suit in which the heirs and devisees of a deceased owner of land, occupied by him as a homestead, are parties, the premises are set off to the widow of the deceased as her homestead, this is an adjudication that up to that time she had not lost her homestead by abandonment. *Plummer v. White,* 474.

ABANDONMENT.

12. *The alienation of the homestead by a widow* after it has been set off to her, does not constitute an abandonment of it, but her grantee may hold the same against the heir. *Ibid.* 474.

13. *By accepting lease of premises.* Where the owner of land sold on foreclosure against him, sells his interest to another, who procures an assignment of the certificate of purchase, and pays the balance of the price to such owner, and the latter, after a deed is made on the foreclosure sale, takes a lease of the person so purchasing, the accepting of such lease will be a surrender and abandonment of the premises, within the

HOMESTEAD. ABANDONMENT. Continued.

meaning of the Homestead act, and the former owner will have lost his homestead, though not properly released in the mortgage under which the sale was made. *Winslow et al. v. Noble et al.* 194.

14. *Former decision.* What was said in *Booker v. Anderson*, 35 Ill. 66, as to the effect of taking a lease under similar circumstances, can have no bearing now, as the statute under which that decision was given did not contain the clause found in the present statute, "or possession is abandoned, or given pursuant to the conveyance."*

ICE—RIPARIAN OWNER.**AS TO OWNERSHIP IN ICE.**

1. *Rights of riparian owners.* *Washington Ice Co. v. Shortall*, 46. See **WATER COURSES**, 3.

MEASURE OF DAMAGES.

2. *For taking and removing ice from a stream over the land of another.* See **MEASURE OF DAMAGES**, 1.

IMPAIRING OBLIGATIONS OF CONTRACTS.**AS TO LIABILITY OF STOCKHOLDERS.**

Changing the conditions as to liability for debts of corporation, by subsequent legislation, under constitution of 1848. *Weidenger v. Spruance*, 278. See **STOCKHOLDERS**, 4.

IMPROVEMENTS.**ON SETTING ASIDE CONVEYANCE OF LAND.**

1. On setting aside conveyances of land and vesting the title in the complainant, it is proper to decree the payment of the amount of the enhanced value of the premises by reason of the improvements made under belief of title, less the value of the use and occupation of the premises. Improvements not enhancing the value of the land should not be required to be paid for. *Breit et al. v. Yeaton et al.* 242.

INDEMNITY.**INDEMNITY TO SURETY.**

And release thereof—effect upon surety's right to subrogation. See **SURETY**, 3, 4.

INDICTMENT. See CRIMINAL LAW, 1.**INFANTS.****JURISDICTION OF THEIR PERSONS.**

1. *Through their guardian.* Minors, having the right to sue by their next friend, or guardian, will bring themselves within the jurisdiction of

*The case of *Buck v. Conlogue*, 49 Ill. 391, upon the same question, seems to rest upon *Booker v. Anderson*.

INFANTS. JURISDICTION OF THEIR PERSONS. Continued.

the court by invoking its aid through their guardian, in a proceeding brought in their interest and to protect their rights. *Allman et al. v. Taylor et al.* 185.

CHANCERY—JURISDICTION OF ESTATES OF INFANTS.

2. A court of equity, under its general powers, has jurisdiction over the estates of infants and others under disability, and may, on proper application, order the sale of an infant's unproductive lands to raise means for discharging an incumbrance on productive property in which it has a reversionary interest in fee, though the latter be situate in another State, where the bill seeking such relief shows that such a course is for the best interests of the infant. *Ibid.* 185.

LEASE BY AN INFANT.

3. *Who may avoid it.* A lease executed by a minor is not void, but only voidable at his election, and the lessee can not set up the disability of the lessor to defeat the lease or be relieved from its covenants. *Field et al. v. Herrick et al.* 110.

RIGHT TO IMPEACH DECREE.

4. *When suit is brought without proper authority, in the name of an infant.* Where suit in equity is brought in the names of infants by one as their next friend, without any authority other than being administrator of their father's estate, and the proceeding is adverse to them, instead of being in their interest, the decree rendered may be avoided by such infant parties on bill filed to impeach the same. *Wright et al. v. Gay et al.* 233.

GUARDIAN AD LITEM.

5. *Duty of guardian.* It is the duty of a guardian *ad litem* of infant defendants, to submit to the court, for its consideration and decision, every question involving the rights of his wards. *Stark et al. v. Brown et al.* 395.

DUTY OF COURT TO PROTECT RIGHTS OF INFANTS.

6. But the court will protect the rights of infants where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf. *Ibid.* 395.

PLEADING AND EVIDENCE.

7. *What defences under general answer of guardian.* On a bill for partition against infants, the guardian *ad litem* answered, praying the protection of the court for his wards, and denying that the petitioners had any interest in or title to the premises: *Held*, that under such answer all defences that could be legally availed of, under any answer, were to be considered as interposed on behalf of the minors, and hence they could avail of the Statute of Limitations under the act of 1839. *Ibid.* 395.

INJUNCTIONS.

AT WHOSE INSTANCE.

1. *Bill to restrain sale of property belonging to one partner for taxes due from a firm.* A partnership firm can not enjoin the collector from selling the individual property of one of its members for the taxes due from the firm. That is a matter for the individual partner himself to complain of, and does not injuriously affect the firm. *Lyle v. Jacques et al.* 644.

TO RESTRAIN LAYING RAILROAD TRACK IN STREET.

2. *Under license from the city.* A court of equity will not take jurisdiction to restrain the laying of a railroad side-track by a company in the public street in front of its own property, to connect with the main track of a railway, under license by the city council, by ordinance, on a bill by private individuals owning property in the vicinity, but not abutting on the part of the street to be used. *Truesdale et al. v. Peoria Grape Sugar Co.* 561.

3. Any damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the license of the city holding the fee of the street, must be sought in an action at law. *Ibid.* 561.

INSOLVENT DEBTORS.

DISCHARGE FROM ARREST OR IMPRISONMENT.

1. *Malice as "the gist of the action."* The word "malice," in sec. 2, chap. 72, Rev. Stat. entitled "Insolvent Debtors," implies a wrong inflicted on another with an evil intent or purpose. It requires the intentional perpetration of an injury or wrong on another. Such intention to commit the wrong is necessary to deprive the party of the right to a discharge from arrest or imprisonment under the act. *First National Bank of Flora v. Burkett*, 391.

2. A party shipped a lot of hogs to commission merchants in Cincinnati for sale, taking a bill of lading from the railroad company, after which he applied for and obtained a loan of \$400 from a bank, giving the bank a sight-draft on the commission merchants for that sum, and pledging the bill of lading, which he attached to the draft, and then, before the draft was presented, collected the entire sum due from the commission men, leaving nothing to pay his draft, which was protested: *Held*, that his act in collecting the money, after giving the draft, was an intentional wrong, little, if anything, short of a criminal act, and was malicious, in the statutory sense. *Ibid.* 391.

3. So where a judgment was recovered in an action on the case based upon such cause of action, and upon the non-payment of the judgment a *capias ad satisfaciendum* was issued, under which the defendant was arrested and imprisoned, it was *held*, that by reason of his wrongful act he could not avail of the provisions of the Insolvent Debtor's act to obtain his discharge from the imprisonment. *Ibid.* 391.

INSTITUTIONS OF LEARNING.

EXEMPTION FOR TAXATION.

To what properly the exemption applies. See TAXATION, 3.

INSTRUCTIONS.

OF THEIR QUALITIES.

1. *Deciding upon a question of fact.* An instruction telling the jury, as a matter of law, that an ordinary switchman's lantern, giving forth a white light, is a sufficient compliance with a city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc., is properly refused, as taking from the jury an important fact which it is their province to find from the evidence. *Pennsylvania Co. v. Conlan*, 93.

2. *Singling out a single fact.* An instruction is properly refused which singles out an isolated fact, saying that it alone does not constitute willful or wanton negligence, especially when the question does not hinge on such fact alone, and the instruction does not assume to be predicated upon the evidence. *Ibid.* 93.

FAILURE TO MARK AS "GIVEN."

3. A judgment of conviction in a criminal case will not be reversed merely because the court failed to mark two of the defendant's instructions as "given," where the record shows they were given to the jury as asked. *Tobin v. The People*, 121.

PROVINCE OF THE COURT AND THE JURY.

4. It is the office of the judge to instruct the jury in points of law, and of the jury to decide on matters of fact. *Pennsylvania Co. v. Conlan*, 93.

INSTRUCTIONS CONSTRUED.

5. *As to previous good character of one accused of crime.* On the trial of one for manslaughter, an instruction that the defendant's evidence of his general reputation for peaceableness was allowable, and should be considered by the jury as a circumstance in the case; but that if, from all the evidence in the case, the jury were satisfied, beyond a reasonable doubt, of the guilt of the accused, it was their duty to find him guilty, notwithstanding the fact he had before borne a very good character for peaceableness, was held not erroneous, as in effect directing the jury to disregard the proof of good character. *Hirschman v. The People*, 568.

6. *As to credibility of impeached witness.* An instruction that the testimony of a defendant in a criminal case is to be tested by the same rules applicable to other witnesses in determining his credibility and the weight of his evidence, and that if the jury, after considering all the evidence in the case, find the accused has willfully and corruptly testified falsely to any fact material to the issue, they have the right to

INSTRUCTIONS. INSTRUCTIONS CONSTRUED. *Continued.*

entirely disregard his testimony, excepting in so far as it is corroborated by "other credible evidence," is not erroneous. The "other credible evidence," in such connection, includes all kinds and every kind of evidence. *Hirschman v. The People*, 563.

INSURANCE.

FURNISHING PROOFS OF LOSS.

1. *As to the time—policy construed.* Where an insurance policy provides, that "in case of loss assured shall forthwith give notice of said loss, * * * and as soon after as possible render a particular account of such loss," the words "forthwith," and "as soon as possible," will be construed to mean within "a reasonable time," "without unreasonable delay," and are the equivalent of "due diligence." *Scammon v. Germania Ins. Co.* 621.

2. *Delay in furnishing proofs, when unreasonable.* A policy of insurance required that notice of a loss should be given forthwith, and proofs of the particulars of the loss rendered as soon thereafter as possible, and payment was not to be made until sixty days after such proof. No attempt was made to furnish the company such proofs for more than nine months after a loss, and no excuse was shown for the delay: *Held*, that the delay was unreasonable, and that no recovery could be had on the policy. *Ibid.* 621.

INSURANCE COMPANIES.

OF THEIR DISSOLUTION.

At the suit of the Auditor—under the act of 1874. *Chicago Life Ins. Co. v. The Auditor*, 82. See CORPORATIONS, 15 to 24.

INTEREST.

ON AN ACCOUNT.

1. *Unreasonable and vexatious delay in payment.* Under the statute, to entitle a party to recover interest upon an open account, there must be something more than mere delay in making payment after demand. The delay of payment must be both unreasonable and vexatious.* *Devine v. Edwards*, 138.

* As to allowance of interest for unreasonable and vexatious delay of payment, see *Bedell v. Janney*, 4 Gilm. 193; *Hitt v. Allen*, 13 Ill. 596; *Kennedy et al. v. Gibbs et al.* 15 id. 406; *Newlan v. Shafer*, 38 id. 379; *McCormick v. Elston*, 16 id. 204; *Aldrich v. Dunham*, id. 403; *Daniels v. Osborn*, 75 id. 615; *Jassey v. Horn*, 64 id. 379; *Chapman v. Burt*, 77 id. 337.

Whether there has been an unreasonable and vexatious delay of payment is a question of fact for the jury. *Davis et al v. Kenaga*, 51 Ill. 170; *Kennedy et al. v. Gibbs et al. supra*.

INTOXICATING LIQUORS.

SALE BY DRUGGISTS—WITHOUT LICENSE.

1. *Prohibited.* The sale of intoxicating liquor, in less quantity than one gallon, by a regular druggist, even if it be in good faith for medical purposes, without a license or permit to do so from the proper municipal authorities, is prohibited by our statute, and any druggist or other tradesman, though not the keeper of a dram-shop or tippling house, who shall so sell the same without license, is liable to indictment, though the liquor is bought and sold, and in fact used, solely for medicinal purposes. *Wright v. The People*, 128.

JUDGMENTS.

CLAIMS AGAINST ESTATES—BARRED BY LIMITATION.

Of the proper judgment to be entered. See ADMINISTRATION OF ESTATES, 10, 11.

JUDICIAL SALES. See SALES, 1 to 5.

JURISDICTION.

OF JUSTICES OF THE PEACE.

1. *Uniformity of jurisdiction required—and this applies to territorial jurisdiction.* See JUSTICES OF THE PEACE, 1, 2, 3.

OF THE CIRCUIT COURT.

2. *In suit at law against executors.* The circuit court has, under sec. 12, art. 6, of the constitution, jurisdiction of an action of assumpsit brought against the executors of an estate upon a claim which had accrued against the testator, and this jurisdiction is unaffected by the statute conferring jurisdiction upon the county court in the same class of cases. *Darling et al. v. McDonald*, 370.

IN SUITS AGAINST EXECUTORS, ETC.

3. *In the State of Missouri—judgment void for want of jurisdiction in that State.* See ADMINISTRATION OF ESTATES, 8.

AS TO THE PERSONS OF INFANTS.

4. *Jurisdiction acquired through their guardian.* Minors, having the right to sue by their next friend, or guardian, will bring themselves within the jurisdiction of the court by invoking its aid through their guardian, in a proceeding brought in their interest and to protect their rights. *Allman et al. v. Taylor et al.* 185.

CONTESTED ELECTION—AS TO MAYOR OF A CITY.

5. *County court has jurisdiction.* The county court has jurisdiction to hear and determine contested elections of mayors of cities organized under the general law relating to cities and villages. The common council has no such jurisdiction, possessing no judicial powers. *Winter v. Thistlewood*, 450.

IN CHANCERY. See CHANCERY, 1, 2, 8.

JUSTICES OF THE PEACE.

UNIFORMITY OF JURISDICTION.

1. *Embraces territorial jurisdiction.* The territory in which a justice of the peace may act, or send process for service, is essential, and constitutes jurisdiction, and is referred to and embraced in the constitutional provision requiring uniformity of jurisdiction, and the provision prohibiting the passage of local or special laws regulating the jurisdiction and duties of justices of the peace. *People ex rel. v. Meech*, 200.

2. *What is uniformity in territorial jurisdiction.* The constitution does not require that the districts within the limits of which the jurisdiction of justices of the peace and police magistrates is restricted or confined shall be of uniform size, but that such districts shall be created by counties or townships, and not partly of both, so that their jurisdiction throughout the State shall be coëxtensive with the counties in which they are elected, or limited to townships, if townships are adopted as the basis for districting. *Ibid.* 200.

3. *Act of 1881, re-districting Cook county—of its constitutionality.* The act of 1881, to amend certain sections of the act relating to the election of justices of the peace, creating each county in the State, except Cook county, a district, and making two districts of Cook county, and limiting the jurisdiction of such officers within such districts, is in contravention of that part of the constitution which requires that the jurisdiction of justices of the peace shall be uniform, and also of that part which prohibits the passage of any local or special laws regulating the jurisdiction of justices of the peace, such amendment operating to change the preëxisting law on the subject only in Cook county. *Ibid.* 200.

LACHES. See LIMITATIONS, 9 to 12.

LANDLORD AND TENANT.

PRIOR TENANT HOLDING OVER.*

1. *Rights of the parties to the second lease.* A lessee can not have his lease set aside and be released from his covenants to pay rent, from the mere fact that a prior tenant, whose term has expired, holds over, without right. The lessee, having the right of possession, should take legal steps to obtain possession against such prior tenant. *Field et al. v. Herrick et al.* 110.

PRIOR TENANT IN POSSESSION.

2. *Acceptance of rent by landlord from second lessee.* Where the assignee of a lease makes an arrangement with a prior lessee holding over without right, dismissing a suit for possession, whereby the prior lessee is to pay the same rent the lessee was to pay, the payment of such

* As to the character and extent of the liability of a tenant holding over, see *Clinton Wire Cloth Co. v. Gardner et al.* 99 Ill. 151.

LANDLORD AND TENANT. PRIOR TENANT IN POSSESSION. Continued.

rent for several months by such prior tenant to the agent of the lessor, and its acceptance by him as payment of rent under the last lease, is no cause for setting aside such last lease and discharging the last lessee from his covenants to pay rent. *Field et al. v. Herrick et al.* 110.

LAW AND FACT.**AS TO SUFFICIENCY OF LIGHT FROM SWITCHMAN'S LANTERN.**

1. *In compliance with city ordinance.* An instruction telling the jury, as a matter of law, that an ordinary switchman's lantern, giving forth a white light, is a sufficient compliance with a city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc., is properly refused, as taking from the jury an important fact which it is their province to find from the evidence. *Pennsylvania Co. v. Conlan*, 93.

NEGLECTANCE.

2. *Is a question of fact.* The question of negligence is not one of law, but of fact, and must be proved like any other. Hence an instruction is properly refused which tells the jury, as a matter of law, that certain facts *per se* constitute negligence. By this it is not meant that the definition of negligence is one of fact, to be determined by the jury. *Ibid.* 93.

3. Expressions may be found under the old practice, when this court was required to review questions of fact as well as of law, that certain facts were evidence of negligence. But such expressions are mere argument—the expression of a conclusion of fact, and not of law. *Ibid.* 93.

LEASE.**LEASE BY AN INFANT.**

1. *By whom it may be avoided.* See **INFANTS**, 3.

LEASE BY GUARDIAN—OF WARD'S LAND.

2. *As to approval by probate court.* See **GUARDIAN AND WARD**, 1.

LICENSES.**POWERS OF MUNICIPAL CORPORATIONS.**

1. *To require the taking out of license for certain occupations and kinds of business—construction of the general Incorporation law.* *City of Cairo v. Bross*, 475. See **CORPORATIONS**, 27, 28.

INTOXICATING LIQUORS.

2. *Sale by druggists without license—prohibited.* See **INTOXICATING LIQUORS**, 1.

LIENS.

LIEN OF COLLECTOR'S BOND.

1. *In respect to the homestead.* A homestead not exceeding \$1000 in value, owned and occupied by a county collector as his residence, is not subject to the statutory lien of his bond; but if it exceeds that value, then the excess, but only the excess, is subject to such lien. *Crawford et al. v. Richeson et al.* 351.

2. *Whether lien attaches before the homestead is occupied.* Where, after the recording of a collector's bond, which is declared a lien on all his lands, he purchases land for a homestead, and within a reasonable time thereafter moves upon and occupies it as such, the land so bought will be considered as becoming his homestead from the time of acquiring the title, and the lien will not attach, although a short space of time may have intervened between its purchase and occupancy. *Ibid.* 351.

3. *As to after-acquired lands.* The statutory lien created by the approval and recording of a collector's bond attaches not only to the lands then owned by the principal, but also to after-acquired lands, the same as in the case of a judgment. *Ibid.* 351.

LIEN OF A PRIOR MORTGAGE.

4. *Made subordinate to a lien of receiver's certificates of indebtedness—by decree of court—of the proper time to question the power of the court in that regard.* See RECEIVER'S CERTIFICATES, 1.

LIEN ON LAND FOR TAXES.

5. *Not affected by personal judgment for the same taxes.* *People v. Stahl*, 346. See TAXATION, 4.

LIMITATIONS.

POSSESSION—TO DEFEAT LEGAL TITLE.

1. Adverse possession sufficient to defeat the legal title must be hostile in its character, and continue uninterruptedly for twenty years. *Bolden et al. v. Sherman*, 483.

LIMITATION ACT OF 1835.

2. To make seven years possession by actual residence a bar to the recovery of land, under the Limitation act of 1835, the party must show that during such possession he had a connected title, in law or equity, deducible of record from this State or the United States. *Ibid.* 483.

LIMITATION ACT OF 1839.

3. *Payment of taxes.* Where the record shows that both parties in an action of ejectment have paid the taxes on the land in suit for seven years prior to the suit, without showing which paid first, a defence is not made out under the Limitation law of 1839. The burden of proof is upon the defendant setting up the statute, to show that he paid such taxes before the plaintiff. The party paying first in any year is the one who has paid the taxes of that year. *Ibid.* 483.

LIMITATIONS. LIMITATION ACT OF 1839. *Continued.*

4. *What is color of title.* As the commissioners of highways can not be grantors of land in any case whatever, their deed for a highway is void, and can not be relied on as color of title under the Limitation law. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157.

5. *The use must be adverse.* The grant of a joint and mutual use of a highway to a railroad corporation with the public, can not be set up under the Limitation law of 1839 as a bar, as the use in such case by the corporation is not adverse. *Ibid.* 157.

6. *Color of title—by whom it may be acquired under tax sale.* An administrator of an estate, having no power or control over the land of his intestate, and not being required to pay the taxes thereon, may rightfully become the purchaser of the same, as against the heirs, at a sale for the taxes thereon, and set up his deed as color of title, under the Limitation law of 1839. *Stark et al. v. Brown et al.* 395.

ACTION BARRED IN ANOTHER STATE.

7. *Also barred in this State.** Where a demand against the estate of a deceased non-resident is barred by the laws of the State where he was domiciled at the time of his death, it is equally barred in this State. *Wernse et al. v. Hall, Admr.* 423.

PLEADING THE STATUTE.

8. *Sufficiency thereof.* On a bill for partition the adult defendants answered, denying that the petitioners had any interest in the land, and alleging that the tract was owned by their father, that he sold the same to another, since deceased, whose heirs are the owners of it, subject to a deed of trust or mortgage executed by such grantee to their father, and that the former, at the time of his death, was in the actual possession of the premises, and had been for several years, and had placed upon the same valuable and permanent improvements, and that their father and his said grantee had paid the taxes thereon for thirty years, consecutively: *Held*, that such answer was not technically sufficient to present a defence under the second section of the Limitation law of 1839. *Stark et al. v. Brown et al.* 395.

LAPSE OF TIME ASIDE FROM THE STATUTE.

9. *Whether a bar to relief.* Equity will not assist a party who has not been reasonably diligent in asserting his rights. Stale claims will not be encouraged, since by the lapse of time there must of necessity be great difficulty in arriving at the exact facts of the case; and this rule will be applied as a bar to relief sought against a trustee. *Lequatte et al. v. Drury et al.* 77.

10. On a bill for the partition of land in which the complainants claimed an equitable title, and that the defendant held the legal title in

*See *Hyman v. Bayne*, 83 Ill. 256, as to the effect of the 20th section of the Limitation act of 1872.

LIMITATIONS. LAPSE OF TIME ASIDE FROM THE STATUTE. Continued.

trust for them, which bill was not filed until thirteen years after the defendant obtained his deed, under which he had ever since claimed the land against all others, the defendant in his answer set up the *laches* and delay of the complainants as a defence: *Held*, that the *laches*, unexplained, was such as to constitute a bar to the relief sought. *Lequatte et al. v. Drury et al.* 77.

11. Where a party has knowledge of the facts entitling him to equitable relief, and rests, without taking any steps to assert his rights, for nearly seven years, giving no excuse for his delay except ignorance of the law, his *laches* will be such as to bar his right to relief. It is otherwise when the party is ignorant of the facts affecting his rights, until shortly before suing. *Breit et al. v. Yeaton et al.* 242.

12. *The right to charge property purchased with trust funds with the original trust, must be exercised promptly.* *Breit et al. v. Yeaton et al.* 242. See TRUSTS AND TRUSTEES, 8.

MALICE.

AS THE "GIST OF AN ACTION."

Under the Insolvent Debtors' act. First National Bank of Flora v. Burkett, 391. See INSOLVENT DEBTORS, 1, 2.

MANDAMUS.

WHEN THE PROPER REMEDY.

1. *To compel the issue of corporate bonds.* A court of chancery has no jurisdiction to entertain a bill to compel the corporate authorities of a town to issue and deliver its bonds in pursuance of a vote to aid in the construction of a railroad. The proper remedy is by *mandamus*. A court of chancery has not the power to compel the performance of contracts for the payment of money, or to give notes or bonds. *Chicago, Danville and Vincennes Railroad Co. et al. v. The Town of St. Anne et al.* 151.

MARRIAGE SETTLEMENT.

RESTRAINT UPON POWER OF ALIENATION.

And as to manner of execution of power of disposition. See RESTRAINT UPON ALIENATION, 1; POWERS, 1 to 4.

MARRIED WOMEN.

POWER OF DISPOSITION OF PROPERTY.

By will or deed—upon marriage settlement. See POWERS, 1 to 4.

MASTER IN CHANCERY.

PRACTICE—ON REFERENCE TO MASTER.

As to proper time to interpose objections. See CHANCERY, 15.

MEASURE OF DAMAGES.**TAKING ICE FROM STREAM OF ANOTHER.**

1. *Where a person takes the ice in a stream over the land of another, to which the owner of the land has the exclusive right, the measure of damages in trespass for such wrongful taking is the value of the ice as soon as it is made a chattel,—that is, when scraped, plowed, sawed, cut and severed, ready for removal. The rule is analogous to cases where coal is wrongfully taken from the soil of another. Washington Ice Co. v. Shortall, 46.*

ON CONDEMNATION OF RIGHT OF WAY.

2. *Measure of compensation to lessee of premises. See EMINENT DOMAIN, 3.*

MERCHANTS.**POWER TO IMPOSE LICENSE FEE UPON THEM.**

- Under the general Incorporation law. City of Cairo v. Bross, 475.*
See CORPORATIONS, 28.

MISTAKE.**MONEY PAID BY MISTAKE.**

1. *Whether recoverable back. See ACTIONS, 3.*

ON ASSESSMENT FOR TAXATION.

2. *Mistake in owner's name—will not vitiate the assessment. See TAXATION, 2.*

MONEY PAID.

- ACTION TO RECOVER IT BACK.** See ACTIONS, 3.

MORTGAGES AND DEEDS OF TRUST.**DEED ABSOLUTE IN FORM.**

1. *Parol evidence to show a deed is a mortgage. It is well settled in our courts that parol evidence is admissible in equity to show that a deed in form absolute was intended as a mortgage. Wright et al. v. Gay et al. 233.*

TRUSTEE'S SALE.

2. *Unauthorized bid by the trustee in name of creditor. Where the creditor in a deed of trust directs the trustee to sell for the entire debt due, but sends no bid or authorizes any to be made for him, a bid by the trustee in the creditor's name is without authority, and the making of a deed for the property to the creditor, and recording the same, will not affect his rights if he does not accept the deed, and no title will pass. Ellsworth v. Harmon, 274.*

MUNICIPAL CORPORATIONS. See CORPORATIONS, 27 to 32.

MUNICIPAL SUBSCRIPTIONS AND BONDS.

OF AN ELECTION.

1. Where a law for an election to determine whether a subscription, etc., shall be made by a town to aid a railroad corporation, provides that "such election shall be held and conducted, and returns thereof made, as is provided by the Township Organization law in towns organized under said law," an election held on the question, as in the case of an ordinary town meeting, presided over by one moderator only, with only one clerk, is void, and will confer no authority to issue the bonds of the town. Such a provision requires the election to be held by three judges and two clerks, as in general elections. The words "town meeting," and the word "election," as used in the Township Organization law, are not convertible terms. *Chicago and Iowa Railroad Co. et al. v. Mallory et al.* 583.

BURDEN OF PROOF.

2. *As to whether the bonds should be issued.* In a suit by a railroad company to enforce the issuing of bonds by a municipality for its use, the burden of proof is upon the railroad company to show affirmatively that the issue of the bonds was authorized by a vote of the people, had pursuant to a law providing therefor, prior to the adoption of the present constitution, and the law under which the election is held must be substantially complied with, or the election will confer no authority. *Ibid.* 583.

AS TO THE MODE OF PAYMENT.

3. *Rights of the parties in respect thereto.* Under an authority to a town to vote a donation in aid of a railroad company, and to levy and collect taxes to pay the same, or to vote such aid and to borrow money to pay the same, and to issue interest-bearing bonds to pay such loans, the company can not be compelled to take bonds of the town in payment, nor can it compel the town authorities to issue bonds to it. The company, in such case, has only a claim for money, and has no right to say how the money shall be raised. *Chicago, Danville and Vincennes Railroad Co. et al. v. The Town of St. Anne et al.* 151.

REMEDY—TO COMPEL THE ISSUE OF CORPORATE BONDS.

4. *By mandamus, not in chancery.* See MANDAMUS, 1.

NATIONAL BANKS.

WHO IS A "SHAREHOLDER."

Liability for debts of the corporation. See STOCKHOLDERS, 7.

NEGLIGENCE.

NEGLIGENCE IS A QUESTION OF FACT.

Not of law. See LAW AND FACT, 2, 3.

OF THE EVIDENCE.

In a suit to recover for negligence. See EVIDENCE, 13, 14, 15.

NEW TRIALS.

ON THE EVIDENCE—IN A CRIMINAL CASE.

1. *On indictment for murder.* Where the deceased, who was shot by assassins, in his dying declaration stated that the defendant and his confederates were distinctly recognized by him at the time of the shooting, which was corroborated by another witness' testimony of a conversation with the defendant, which tended to show his guilty knowledge and apprehension of arrest for the killing, and the defence was an *alibi* attempted to be shown by those charged as being confederates and actors in the homicide, and their relatives, it was *held*, that the evidence did not justify the court in granting a new trial on a conviction, and sentence of the defendant to the penitentiary for eighteen years. *Norris v. The People*, 408.

NEWLY DISCOVERED EVIDENCE.

2. A new trial will not be granted on the ground of newly discovered evidence, where it does not appear but the evidence might have been had on the trial by the exercise of reasonable diligence, nor where such evidence is in its nature impeaching, only. *Tobin v. The People*, 121.

ABSENCE OF WITNESS.

3. *From sickness.* A new trial will not be granted in a criminal case because an important witness was prevented from attending the trial by sickness, and the prisoner's counsel failed to bring such fact to the notice of the court. The party in such case should have asked for a continuance. *Ibid.* 121.

NON-SUIT.

UPON THE EVIDENCE. See PRACTICE, 9.

NOTICE.

POSSESSION OF LAND.

1. *As notice of party's equity.* Actual possession of land under a parol or unrecorded contract of purchase, before the recovery of a judgment against the vendor, is notice to the judgment creditor, and all persons claiming under him, of the purchaser's rights. *Walsh et al. v. Wright*, 178.

RECITALS IN DEED.

2. *Notice thereby—as to use of trust funds.* Where a deed made by a husband to a trustee recited that he had invested certain trust funds of his wife in the purchase of the land, and therefore conveyed such land to the trustee, to be held subject to the original trust, as modified by a decree of court, and he afterwards, without proper authority, procured a conveyance from the trustee to himself, of the land, it was *held*, that the recitals in the deed to the trustee (which deed was recorded) were sufficient to put purchasers from the husband on inquiry, and afforded notice that he held the lands in trust. *Breit et al. v. Yeaton et al.* 242.

NOTICE. RECITALS IN DEED. *Continued.*

3. *As to condition precedent to power to convey.* A deed from a wife and her trustee to her husband, for the expressed consideration of \$5, for valuable real estate, not purporting to have been made upon the written request of the wife, attested by three witnesses, as required by the instrument creating the trust, or pursuant to any decree of court, when recorded is notice of its imperfection to all the world. *Breit et al. v. Yeaton et al.* 242.

ON AMENDMENT OF PROCESS.

4. *At subsequent term—notice required.* See AMENDMENTS, 1.

NOTICE OF SALE FOR TAXES.

5. *Sufficiency—as to place of sale.* See TAXATION, 5.

OFFICIAL BONDS.

BOND OF COLLECTOR OF TAXES.

Extent of its lien—and right of sureties thereon to subrogation. *Crawford et al. v. Richeson et al.* 351. See LIENS, 1, 2, 3.

PARTIES.

WHO ARE NECESSARY PARTIES.

1. *Generally—and when one not a party may be bound by a decree.* Where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not necessary to bring both before the court to bind them by the decree. *Breit et al. v. Yeaton et al.* 242.

ON BILL IN CHANCERY AFFECTING TITLE TO LAND.

2. If there is no tenant in tail in being, the first person in being entitled to the inheritance should be made a party to a bill in chancery affecting the title to land, and if there be no such person in being, then the tenant for life; and in such cases the decree will bind the other persons not in being. *Ibid.* 242.

AS TO AFTER-BORN CHILDREN.

3. On bill by husband and wife, against trustees, to reform a marriage settlement made by the wife in contemplation of marriage, on the ground of mistake, her children, who are to take the estate in fee after the death of the party holding for life, are necessary parties. They, taking as purchasers, will not be affected by any decree to which they are not made parties, even though such decree is rendered before their birth. *Ibid.* 242.

ON BILL FOR INJUNCTION.

4. *To restrain the sale of individual property for taxes due from firm.* A partnership firm can not enjoin the collector from selling the individual property of one of its members for the taxes due from the firm. That is a matter for the individual partner himself to complain of, and does not injuriously affect the firm. *Lyle v. Jacques et al.* 644.

PARTITION.**ADJUSTING CONFLICTING TITLES.**

1. On bill in equity for the partition of lands, the court is invested by statute with power to adjust all conflicting titles, and it may set aside conveyances under which adverse titles are claimed. *Breit et al. v Yeaton et al.* 242.

PARTITION OF LAND HELD IN TRUST.

2. *Effect as to the title.* See TRUSTS AND TRUSTEES, 9.

PARTNERSHIP.**POWERS OF INDIVIDUAL PARTNERS.**

1. *Right to pledge collaterals for money.* Where one partner entrusted with the winding up of the business of the firm was authorized, by agreement, to trade any part of the assets, and to do all and everything for settling its affairs that might be deemed expedient, it was held, that such partner was authorized, on borrowing money to pay a liability of the firm, to pledge notes of the firm as collaterals to secure not only the new indebtedness so created, but also a prior indebtedness of the firm to the same creditor. *Smith et al. v. Dennison, Receiver,* 531.

2. *Of rights under a transfer as between partners.* Where one partner transfers and delivers to another all the assets of the firm, to collect the debts due the firm and pay and discharge its liabilities, giving such managing partner all the powers possessed by both, for the purpose of settling the partnership affairs and a division of the proceeds after payment of the debts, this is not an assignment for the benefit of creditors of the firm, but one for the benefit of the parties, and will not prevent the partner taking the assignment from securing one creditor to the prejudice of others. *Ibid.* 531.

PAYMENT.**WHAT AMOUNTS TO A PAYMENT.**

1. *As affecting rights of subsequent purchaser of mortgaged premises—subrogation of pledgee to rights under the mortgage.* *Loewenthal v. McCormick et al.* 143. See PLEDGE, 1, 2.

POSSESSION OF NOTE BY PAYEE.

2. *Presumption as to payment.* The possession of a promissory note in the hands of the personal representative of the payee, unexplained, is *prima facie* evidence that it has not been fully paid, and when it is produced in evidence, the burden of proof is on the maker to establish payment, by a preponderance of evidence. *Ritter v. Schenk et al.* 387.

PAYMENT OF INTEREST AFTER DEBT FULLY PAID.

3. *Effect on rights of parties.* The payment of interest on the amount claimed to be due when the note was in fact fully paid, the

PAYMENT. PAYMENT OF INTEREST AFTER DEBT FULLY PAID. *Continued.*

holder claiming compound interest, will not conclude the maker from afterwards proving a prior payment in full, where such payment of interest was made in ignorance of his rights. *Ritter v. Schenk et al.* 387.

PLEADING.

ADMISSION BY PLEADING OVER.

1. *As to sufficiency of prior pleading.* By pleading the general issue in assumpsit, the defendant, as a general rule, impliedly admits the legal sufficiency of the declaration, and the right of the plaintiff to recover upon proof of the facts therein charged. But there are cases in which, notwithstanding this implied admission, the declaration will be insufficient to support a judgment for the plaintiff. *Wrought Iron Bridge Co. v. Comrs. of Highways*, 518.

STATUTE OF LIMITATIONS.

2. *Whether properly pleaded.* On a bill for partition the adult defendants answered, denying that the petitioners had any interest in the land, and alleging that the tract was owned by their father, that he sold the same to another, since deceased, whose heirs are the owners of it, subject to a deed of trust or mortgage executed by such grantee to their father, and that the former, at the time of his death, was in the actual possession of the premises, and had been for several years, and had placed upon the same valuable and permanent improvements, and that their father and his said grantee had paid the taxes thereon for thirty years, consecutively: *Held*, that such answer was not technically sufficient to present a defence under the second section of the Limitation law of 1839. *Stark et al. v. Brown et al.* 395.

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS.

1. *Variance as to immaterial allegation not fatal.* As a party is not bound to prove matters which are merely surplusage, if the proof does not correspond with such matters alleged the variance is immaterial. *Pennsylvania Co. v. Conlan*, 93.

2. *No variance to prove more than is alleged.* In an action against a railroad company to recover for an injury by striking the deceased with a moving train of cars, the declaration alleged that the deceased, at the time, was engaged in his duty in passing over and upon a certain track, "to give directions to others of his co-servants, and to aid in the switching, movement and operation of certain cars being switched upon" such track. There was evidence tending to prove this allegation: *Held*, that proof that deceased had another duty to perform, as, taking the numbers of the cars, in a memorandum book, constituted no variance, as what the deceased was doing at the time was no part of the tort complained of, or of the means adopted in effecting it. *Ibid.* 93.

PLEADING AND EVIDENCE. ALLEGATIONS AND PROOFS. Continued.

3. In such case the *gist* of the action is the defendant's negligence, as alleged, and the motives of the deceased in being upon the track, or why he was there, are wholly immaterial, it being sufficient that he was lawfully there. Any allegation showing why the deceased, as switchman, was upon the track, except that he was rightfully there, is surplusage. *Pennsylvania Co. v. Conlan*, 93.

4. *As to contract for purchase of land.* A bill by a purchaser of land to set aside a sale under judgment and execution against one of the vendors, alleged that the complainant bought from two persons who were the owners, and the proof showed that the negotiation for the purchase was made with only one of them, who was at the time the agent of the other, for whom he acted, as well as for himself, in making the sale, and who sent the other his share of the purchase money, and which other owner afterwards conveyed his interest to the one making the sale, to enable the latter to carry the contract into execution: *Held*, that there was no variance, and even if there had been, it was not material, as the bill did not seek a specific execution of the contract. *Walesh et al. v. Wright*, 178.

ALLEGATIONS AND DECREE.

5. *Must correspond.* On a creditor's bill to set aside certain voluntary conveyances as having been made to hinder and defraud creditors, a prior compromise of the debtor with the creditor, by which fifty per cent of his indebtedness was taken in full discharge, can not be set aside, and the settlement opened for fraud, where no such case is made in the pleadings, or shown by the proof. *Jackson v. Miner et al.* 550.

AS TO MANNER OF ASSERTING HOMESTEAD RIGHT.

6. *So as to admit the proofs.* Where a bill to enforce the lien of a collector's bond on land owned and sold by him, before the bond was discharged, alleged that the bond was a lien on the land, which the answer simply denied, it was *held*, that under the issue thus formed evidence of a homestead right was competent, as going to show the bond was never a lien on the land. *Crawford et al. v. Richeson et al.* 351.

EVIDENCE UNDER THE GENERAL ISSUE.

7. *In assumpsit.* Under the general issue in assumpsit it devolves upon the plaintiff to prove the defendant's promise, as charged in the declaration, by direct proof, or to show by the evidence a state of facts from which the law will imply such promise. *Wrought Iron Bridge Co. v. Comrs. of Highways*, 518.

GENERAL ANSWER OF GUARDIAN AD LITEM.

8. *What defences allowed thereunder.* *Stark et al. v. Brown et al.* 395. See **INFANTS**, 7.

PLEDGE.

SUBROGATION—RIGHTS OF PLEDGEE.

1. *As to mortgage security for principal debt.* If a bank advances the money due on a note secured by deed of trust, to the holder, under a contract with the maker that the note shall be transferred to the bank, to be held as a pledge for the repayment of the money so advanced, the lien of the trust deed will remain until the advance is repaid; and if another, under a similar agreement with the maker, pays the bank its advance, and the note and deed of trust are passed over to him as security for the money thus paid the bank, the latter, in equity, will be subrogated to the rights of the bank, and entitled to hold the note and deed of trust as security for the money so advanced by him. *Loewenthal v. McCormick et al.* 143.

2. *Payment of part of debt by pledgor—respective rights of pledgee and subsequent purchaser of the mortgaged premises.* Where a party draws his check upon his banker for a sum sufficient to pay off his note secured by deed of trust, and held by another, under an agreement with the bank to make the check good as to any deficiency in his account with the bank, and to take and hold the note and deed of trust in security for the sum paid for him over and above the money deposited to his credit, and it appears from the books of the bank that he had on deposit a sum sufficient to pay the check, less only \$2500, this will be a payment by the maker of the note of its amount, less the \$2500 deficiency in his account, and a discharge of the mortgage, except as to that sum, in favor of subsequent purchasers of the mortgaged premises, and neither the bank nor its assignee can enforce the deed of trust for any more than that sum. *Ibid.* 143.

POSSESSION.

AS NOTICE OF PARTY'S EQUITY. See NOTICE, 1,

POWERS.

POWER OF DISPOSITION BY MARRIED WOMAN.

1. *By will or deed—as to the manner of execution.* Where a marriage settlement, made by a woman in view of marriage, places her property in the hands of trustees, the interest and dividends to be paid to the husband during the joint lives of the parties, and the balance in such part and proportions, manner and form, as she shall, from time to time, during coverture, limit or appoint, by any writing or writings under her hand and seal, attested by three or more credible witnesses, or by her last will and testament, to be by her signed, sealed, etc., in the presence of the like number of witnesses, the power of appointment can not be exercised by her by an ordinary deed of conveyance, simply acknowledged as other deeds, but it must be as directed in the articles of settlement. *Breit et al. v. Yeaton et al.* 242.

POWERS. POWER OF DISPOSITION BY MARRIED WOMAN. *Continued.*

2. Where a woman, just before her marriage, with the consent of her intended husband, transfers her property, consisting of bank stock, to trustees, in trust for the husband during their joint lives, and for herself upon his death, in case she survives, but if she dies first, the remainder to her heirs at law, reserving a power of disposition, her power does not depend upon the statute, but upon the settlement, and she must pursue the mode she has appointed for the exercise of the power. *Breit et al. v. Yeaton et al.* 242.

3. *Of the effect of the Married Woman's act.* The Married Woman's act of 1861, conferring upon married women power to own and control property, as if sole, affects only the separate estate of married women derived in the mode provided therein. It does not apply to property conveyed by her to trustees before marriage, to be held upon certain trusts named in the conveyance, and has nothing to do with the exercise of powers reserved by her in a marriage settlement. *Ibid.* 242.

4. *Effect of a deed by the wife to her husband.* A deed by a wife and her trustee, in 1868, of property conveyed by her to the trustee before marriage, to her husband, is void as a conveyance, and it is also void as an execution of the power of appointment, if not attested by three or more credible witnesses, as required in the conveyance to the trustee, reserving the power of disposition by the wife. *Ibid.* 242.

AIDING DEFECTIVE EXECUTION OF POWER.

5. *In equity.* A defective execution of a power by a wife can not be aided in equity, in favor of her husband. The restrictions as to the form and mode of exercising such power are made for the protection of the wife against the husband, and are matters of substance, and not of mere form. Equity will never aid the execution of a power when the defect is a matter of substance. *Ibid.* 242.

PRACTICE.

TIME TO OBJECT.

1. *Where no objection is made that the damages are excessive,* in the trial court in the motion for a new trial, nor in the Appellate Court, that question is not before this court. *Pennsylvania Co. v. Conlan*, 93.

2. Where it is not assigned as a ground for a new trial in the circuit court that the damages are excessive, nor any assignment of that cause for error in the Appellate Court, it can not be urged in this court that the damages are excessive. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157.

3. *As to admission of evidence under defective pleading.* Although an answer setting up a defence of the Limitation law of 1839 be technically defective, if no exception is taken to it, and no objection is made on the hearing to evidence tending to show color of title in an ancestor of the defendant, or payment of taxes by him or his grantee, and the case

PRACTICE. TIME TO OBJECT. *Continued.*

is tried precisely as if the defence had been formally pleaded, such evidence may be considered, and an objection to the answer and the evidence under it, for the first time in this court, comes too late. *Stark et al. v. Brown et al.* 395.

4. *For condemning strip of land exceeding one hundred feet in width for right of way for railroad.* See EMINENT DOMAIN, 2.

5. *Receiver's certificates of indebtedness made a prior lien to an older mortgage—of the proper time to question the power of the court in that regard.* *Humphreys et al. v. Allen, Receiver, et al.* 490. See RECEIVER'S CERTIFICATES, 1.

6. *On reference to master in chancery.* See CHANCERY, 15.

GENERAL OBJECTION TO EVIDENCE.

7. *What it will embrace.* Objections of a general character to the admission of evidence will be regarded as going only to its competency or relevancy. *Wrought Iron Bridge Co. v. Comrs. of Highways*, 518.

WHEN OBJECTION MUST BE SPECIFIC.

8. *As to secondary evidence.* It is well settled that secondary evidence may always be received upon the trial of an issue, unless objected to on that ground at the time it is given or offered, so that the objection may be obviated by further testimony. The objection to such testimony can not be taken for the first time in a court of review. *Walsh et al. v. Wright*, 178.

NON-SUIT—UPON THE EVIDENCE.

9. On a trial by the court without a jury, where there is evidence tending to show a right of action, a proposition that under the evidence no recovery can be had, is properly refused. In such case the weight of the evidence is for the court to determine. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157.

EXCLUDING ALL OF PLAINTIFF'S EVIDENCE.*

10. *Whether proper.* A motion to exclude all of the plaintiff's evidence at its close, being in the nature of a demurrer to the evidence, is properly refused if there is any evidence tending to prove the plaintiff's case. *Pennsylvania Co. v. Conlan*, 93.

PRESERVING QUESTIONS OF LAW—ON TRIAL BY COURT.

11. *Of the manner thereof.* On a trial by the court alone, if the counsel has any doubt as to the correctness of the view of the law of the

* As to the proper office of a demurrer to evidence, what it should contain, and what it admits: *Crowe v. The People*, 92 Ill. 231; *Vallez v. Okio and Mississippi Ry. Co.* 85 id. 500; *Phillips v. Dickerson*, id. 11.

On the general subject of an involuntary non-suit, or excluding all the plaintiff's evidence from the jury, or instructing the jury to find for the plaintiff, or for the defendant: *Holmes v. Chicago and Alton R. R. Co.* 94 Ill. 440, and cases cited in note; *Caveny v. Weiller*, 90 id. 158; *Hubner v. Feige*, id. 209, and note; *Crowley v. Crowley*, 80 id. 469; *Smith v. Gillett*, 50 id. 291.

PRACTICE.

PRESERVING QUESTIONS OF LAW—ON TRIAL BY COURT. *Continued.*

case as held by the court, he should prepare and submit written propositions of law as he understands it, to be held or refused by the court, and thus preserve for review any erroneous view of the law applicable to the case which the court may entertain. *Wrought Iron Bridge Co. v. Comrs. of Highways*, 518.

REMARKS OF THE JUDGE TRYING A CASE.*

12. *In announcing his rulings.* The court, on overruling a defendant's motion to exclude all the plaintiff's evidence, as not making a case, remarked that he would not give his reason for so deciding, for the counsel did not want him to sum up the testimony and tell the jury why he overruled the motion: *Held*, that there was no error in such remarks. *Pennsylvania Co. v. Conlan*, 93.

EXCEPTION TO RULING OF COURT.

13. *Whether necessary.* See EXCEPTIONS, 1.

PRACTICE IN THE SUPREME COURT.

ASSIGNMENT OF ERROR.

1. *Prior ruling of Appellate Court.* On appeal from the last judgment of the Appellate Court in a case, this court can not consider the propriety of the admission of evidence on a second trial in the lower court, under the prior ruling of the Appellate Court when the case was first before it. *Oldershaw et al. v. Knowles*, 117.

OMISSION TO ASSIGN CROSS-ERRORS IN APPELLATE COURT.

2. *Effect upon right of party on error in the Supreme Court.* An affirmance of a judgment in the Appellate Court on appeal or writ of error, where the appellee or defendant in error files no cross-errors, is not conclusive on the latter, and he may, on writ of error from this court, assign errors, and have the original judgment reversed. *Wiggins Ferry Co. v. The People ex rel. Weber*, 446.

WHAT MATTERS EMBRACED IN AN APPEAL.

3. *As to what is a separate proceeding.* See APPEALS AND WRITS OF ERROR, 1.

SUPPLYING DEFICIENCIES IN RECORD.

4. *At what time.* It is too late, after the decision of this court has been rendered in a cause, and pending an application for a rehearing, to ask for leave to supply alleged deficiencies in the record, unless there be shown very special circumstances calling for an exception to be made

* Remarks of judge in making his rulings—whether ground of error: *Ashbaugh v. Murphy et al.* 90 Ill. 182; *Beasley v. The People*, 89 id. 571; *Skelly v. Boland*, 78 id. 438; *Andreas et al. v. Ketcham*, 77 id. 377; *Farnham v. Farnham*, 73 id. 498.

As to improper remarks of counsel: *Hennies et al. v. Vogel*, 87 Ill. 242; *Kepperty v. Ramsden*, 83 id. 354; *Wilson v. The People*, 94 id. 299.

PRACTICE IN THE SUPREME COURT.

SUPPLYING DEFICIENCIES IN RECORD. *Continued.*

to the usual and proper mode of proceeding. *Allen v. Le Moyne et al.* 655.

ORAL ARGUMENT ON DEMURRER.

5. This court will not hear oral argument upon a demurrer to a pleading in an original proceeding here, except the cause is to be finally submitted for consideration on the demurrer. *People ex rel. Hughes v. Appleton*, 652.

ERROR WILL NOT ALWAYS REVERSE.

6. *Testimony of incompetent witness.* An error in admitting the evidence of an incompetent witness on the hearing of a chancery case, is no ground of reversal when the record contains other evidence which is competent and sufficient to sustain the decree. *Ritter v. Schenck et al.* 387.

7. *As to admission of evidence.* The admission of evidence technically inadmissible, to prove a fact already proven beyond dispute by unobjectionable proof, the improper evidence not being calculated to mislead the jury, affords no ground for a reversal. *Oldershaw et al. v. Knowles*, 117.

8. *The exclusion of the testimony of a defendant*, when called by the complainants to prove facts occurring before the death of a common ancestor under whom both parties claim, if error, is no ground for the reversal of a decree dismissing the bill, where the *laches* of the complainants has been such as to bar any claim to relief. *Lequatte et al. v. Drury et al.* 77.

REHEARING.

9. *Additional suggestions in support of petition.* Additional suggestions in respect to the grounds of an application for rehearing in this court, proposed to be made after the time prescribed by the rules for the filing of the petition, will not be received as of course, but only upon proper cause shown. *Hawley v. Simmons et al.* 654.

10. *Second application by the same party.* A second petition for the rehearing of a cause in this court by the same party will not be entertained. *Smith et al. Adms. v. Dennison, Receiver*, 657.

11. Nor is the application of this rule affected by the fact that the court, upon denying the original petition for a rehearing, may have modified the language of its opinion, or even changed the grounds of its decision. It is the *decision* of the court, not so much the *reasons given* for that decision, that is the subject for reconsideration upon an application for a rehearing, and when the decision originally made is adhered to upon such reconsideration, although the reasons given for it may have been modified, it will not be open to further review at the instance of the same party. *Ibid.* 657.

PRESUMPTIONS.**OF LAW AND FACT.**

1. *In chancery, that only proper evidence was considered.* See CHANCERY, 14.
2. *Presumption as to payment—from possession of note by payee.* See PAYMENT, 2.

PROCESS.**AMENDMENT OF PROCESS.**

- After judgment or decree.* See AMENDMENTS, 1.

PROPERTY.

- ICE—AS PROPERTY IN RIPARIAN OWNER.** See WATER COURSES, 3.

PURCHASERS.**WHO MAY BECOME A PURCHASER.**

1. *At tax sale—and acquire color of title.* An administrator of an estate, having no power or control over the land of his intestate, and not being required to pay the taxes thereon, may rightfully become the purchaser of the same, as against the heirs, at a sale for the taxes thereon, and set up his deed as color of title, under the Limitation law of 1839. *Stark et al. v. Brown et al.* 395.

PURCHASER AT ADMINISTRATOR'S SALE.

2. *Of his rights when widow wrongfully withholds possession—duty of the widow while in possession.* Where the widow wrongfully deprives a purchaser at an administrator's sale, of the possession of the premises bought by him, it is her duty to pay all taxes thereon, and keep the same in a state of reasonable preservation by making ordinary repairs, and if she fails to do so, she will be bound to account to him for the taxes paid by him, and to make compensation for such damages as he may have sustained by reason of her neglect to make the necessary and ordinary repairs. *Doane v. Walker*, 628. Also, see DOWER.

PURCHASER AT JUDICIAL SALE.

3. *Failure to complete his bid—of proceedings to charge him with the loss on a re-sale.* See SALES, 3, 4.
4. *Not bound to see to application of proceeds.* *Allman et al. v. Taylor et al.* 185. See SALES, 2.

SUBSEQUENT PURCHASER OF MORTGAGED PREMISES.

5. *Rights as against a pledgee who is entitled to subrogation under the mortgage—payment of the mortgage debt in part.* *Loewenthal v. McCormick et al.* 143. See PLEDGE, 1, 2.

PURCHASE MONEY.

- UNDER THE HOMESTEAD ACT.** See HOMESTEAD, 4.
46—101 ILL.

QUO WARRANTO.

WHEN THE PROPER REMEDY.

1. *Where board of education undertakes to exercise powers it does not possess.* Under our statute an information in the nature of a *quo warranto* lies against a board of education when it undertakes to exercise any powers not conferred by law, and in such proceeding the legality of any rule adopted by the board for the admission of pupils in the public schools may be tested. *People ex rel. v. Board of Education of the City of Quincy*, 308.

RAILROADS.

USE OF STREETS FOR RAILROAD PURPOSES.

1. *Effect of section 26 of the general Railroad act as to the power of county and town officers.* See HIGHWAYS, 2.
2. *And generally, as to such use of streets.* Same title, 1 to 5.

REAL PROPERTY.

VESTED AND CONTINGENT REMAINDER.

1. *Defined.* A contingent remainder is one, the vesting or taking effect of which in interest is, by the terms of its creation, made to depend upon some contingency which may never happen; while a vested remainder is one that takes effect immediately upon the making of the instrument creating it, though its enjoyment is postponed until the termination of the prior estate. *City of Peoria v. Darst et al.* 609. See CONVEYANCES, 3.

LIMITING A REMAINDER IN FEE.

2. *After.* Where two limitations over in fee to one and to another, are concurrent contingent remainders, limited alternately on the same event to take effect, not the one subsequent to the other in succession, but the one as a substitute for the other, this will not be the limitation of a fee after a fee, and is permissible. *Ibid.* 609.

3. Where both limitations are to take effect, the latter can do so only as an executory devise, for a remainder originally contingent, but afterwards vested by the happening of the contingency, is essentially the same as if it had been vested at its origin; but where both are limited alternately on the same event, by the happening of which one is to vest in exclusion of the other, then both are contingent remainders, and if such event never happens, the second remainder will take effect. *Ibid.* 609.

ICE—AS A PART OF THE REALTY. See WATER COURSES, 3.

RECEIVER'S CERTIFICATES.

FOR INDEBTEDNESS OF RAILROAD.

- * 1. *Made a first lien as against prior mortgage—time to question power of court.* If the holder of railroad bonds secured by trust deeds

RECEIVER'S CERTIFICATES.**FOR INDEBTEDNESS OF RAILROAD. *Continued.***

on the road, having notice of the appointment of a receiver, and an order of court directing him on his petition to issue certificates of indebtedness on which to raise money to discharge a mortgage on the personal property of the company, and to pay taxes, current expenses, etc., and making such certificates a prior and first lien on all the property of the company, desires to question the power of the court to make such order, he must do so before such certificates are issued and sold to *bona fide* purchasers, or paid out to creditors of the company. After their issue and sale, it will be too late for him, or purchasers from him with notice of the facts, to raise the question whether the subject matter to which the certificates were applied was within the scope of the power of the court in the preservation of the property for the benefit of all concerned. *Humphreys et al. v. Allen, Receiver*, 490.

RECITALS IN DEEDS.**OF THEIR EFFECT.**

As evidence—and as notice. See EVIDENCE, 17; NOTICE, 2, 3; TRUSTS AND TRUSTEES, 10.

RECORDING ACT.**OF THE RULE OF PRIORITY.**

1. *As to time of recording.* Under our recording laws, the instrument first on record takes priority, without regard to the time of its execution. So, a subsequent deed will not take effect to cut off a prior mortgage, unless it is first put upon record. *Simmons v. Stum*, 454.

2. A mortgage on land was not recorded until after a conveyance by the mortgagor was made to a person having notice of the mortgage, which deed was recorded, and not until after a conveyance was made by such grantee to another who had no notice of the existence of the mortgage, the mortgage being recorded a few days after the making of the second conveyance. On bill to foreclose the mortgage, such last grantee failed to produce his deed, or show when it was recorded: *Held*, that as the evidence did not show such second conveyance was recorded prior to the recording of the mortgage, it could not take precedence over the mortgage. *Ibid.* 454.

REDEMPTION.**REDEMPTION FROM EXECUTION SALES.**

1. *Redemptions are looked upon with favor*, and where no injury is to follow, a liberal construction will be given to redemption laws, to the end that the property of the debtor may pay as many of his liabilities as possible. *Schuck v. Gerlach*, 338.

2. *What judgment creditor may redeem.* Where land is sold under a decree of foreclosure on a bill in which the heirs of the deceased mort-

REDEMPTION. REDEMPTION FROM EXECUTION SALES. *Continued.*

gagor are made parties, a judgment creditor of one of the heirs may redeem from such sale such heir's interest, and have the same sold under his execution. *Schuck v. Gerlach*, 338.

3. *May be of an undivided interest.* Under the present statute one of several joint owners of land sold under execution, or decree of foreclosure, may redeem whatever interest he has in the same, and so also a judgment creditor of a joint owner may redeem the interest of his debtor. *Ibid.* 338.

4. *Former decision.* The ruling on this question in *Durley v. Davis*, 69 Ill. 133, that a judgment creditor of one of several persons owning land as tenants in common, could not redeem from an execution sale of the entire premises, as to the interest of his debtor, by paying a proportionate part of the amount for which the land was sold, is no longer the law, under sec. 26, ch. 77, Rev. Stat. 1874, p. 625. *Ibid.* 338.

5. *As to part not previously redeemed.* A judgment creditor of a deceased mortgagor, whose claim has been allowed against the estate of the mortgagor, may, after two-fifths of the premises have been redeemed and sold by judgment creditors of the heirs, redeem the remaining three-fifths upon a special execution from the county court. *Ibid.* 338.

6. *Irregularity in execution will not defeat redemption.* An execution was sued out of the county court on a claim allowed against the estate of a deceased mortgagor, in the name of the assignee of the claim, under which the assignee, as a judgment creditor, redeemed land of the mortgagor sold under decree of foreclosure: *Held*, that while it was irregular to issue the execution in the name of the assignee, it was not void, and that in a collateral proceeding it could not be attacked, and that the redemption under it was valid. *Ibid.* 338.

REMAINDERS.

VESTED AND CONTINGENT REMAINDERS.

Defined—and of the application of the doctrine. See REAL PROPERTY, 1, 2, 3; CONVEYANCES, 3.

REMEDIES.

WHETHER AT LAW OR IN CHANCERY.

1. *Generally.* See CHANCERY, 1, 2.

LAYING RAILROAD TRACK IN STREET.

2. *Remedy of private individuals—at law, not in equity.* *Truesdale et al. v. Peoria Grape Sugar Co.* 561. See ACTIONS, 4, 5.

TO COMPEL THE ISSUE OF CORPORATE BONDS.

3. *By mandamus, not in chancery.* See MANDAMUS, 1.

BOARD OF EDUCATION EXCEEDING ITS POWERS.

4. *Remedy by quo warranto.* See QUO WARRANTO, 1.

RESCISSION OF CONTRACTS. See CONTRACTS, 3.

RESTRAINT UPON ALIENATION.

ON SETTLEMENT IN ANTICIPATION OF MARRIAGE.

1. A woman, prior to marriage, may place such restrictions as she pleases upon the future alienation or disposition of her property, not forbidden by or contrary to the policy of the law; and when such restrictions are made to protect the property and herself from the influence of her husband, they will be regarded as of substance, and not of mere form. *Breit et al. v. Yeaton et al.* 242.

REVERSAL OF JUDGMENT.

ON CONDEMNATION OF RIGHT OF WAY.

Effect upon the right of possession previously and lawfully obtained.
See EMINENT DOMAIN, 4.

RIGHT OF WAY. See EMINENT DOMAIN.

RIPARIAN PROPRIETORS. See WATER COURSES.

SALES.

JUDICIAL SALES.

1. *Effect of error in the proceedings.* If a court of general jurisdiction has jurisdiction of the parties, and of the subject matter of the litigation, no matter how erroneously it may thereafter proceed, within the bounds of its jurisdiction, its decrees will be conclusive until reversed or annulled in some direct proceeding, and the title to property acquired at a sale under such a decree, by a stranger to the record, will be upheld, although the decree itself may afterwards be reversed for manifest error. It is the policy of the law to maintain judicial sales. *Allman et al. v. Taylor et al.* 185.

2. *Purchaser not bound by improper application of proceeds of sale.* A purchaser of an infant's lands, under a decree in chancery in a case where the court has jurisdiction, is not bound to see to the application of the funds arising from the sale, nor that the guardian performs his duty under the decree, and a failure of the guardian in that respect will not vitiate the sale rightfully made at the time. *Ibid.* 185.

3. *Proceeding against purchaser for not completing his bid.* A proceeding against a purchaser of land at a master's sale to subject him to the payment of the difference between his alleged bid and what the premises sold for at a re-sale on his neglect to pay the amount of his bid, is essentially a new proceeding from the one in which the sale was ordered, and whether it is against a party to the original suit or a stranger making the alleged bid, he must have notice, unless he voluntarily submits to the jurisdiction of the court, by answer or otherwise. It is a summary proceeding, and it seems it may be either by petition or motion. *Thriffs v. Fritz*, 457.

SALES. JUDICIAL SALES. *Continued.*

4. *Steps necessary to charge purchaser for a loss in consequence of not completing purchase.* It is essential, in order to charge a purchaser at a judicial sale with the difference between his alleged bid and the amount realized on a second sale, that the master should report the sale to him, and that he refuse to comply with his bid; and if, upon notice, he shows no cause against it, he should be ordered to complete his purchase within a certain time fixed by the court, and in default thereof the property should be re-sold at his risk and expense. *Thriffs v. Fritz*, 457.

5. *Master's report—as evidence.* In a proceeding to charge a purchaser of land sold under a decree of foreclosure with the difference between his bid and the sum bid on a re-sale, the master's report will be *prima facie* evidence, under the statute, of what it is by law required to contain. But such reports must be introduced in evidence, and preserved in the record in the usual mode, to authorize a monetary decree against the alleged purchaser. *Ibid.* 457.

IMPEACHING JUDICIAL SALE.

6. *Party seeking to do so should restore the proceeds received by him.* *Byars et al. v. Spencer et al.* 429. See CHANCERY, 9.

OF SEVERAL PARCELS SUBJECT TO LIEN.

7. *And sold under the lien to different persons and at different times—on bill by surety to enforce his right of subrogation, sale to be made in the inverse order of alienation.* *Crawford et al. v. Richeson et al.* 351. See SURETY, 6.

SCHOOLS.

COLORED PUPILS.

1. *Discrimination against them as to what schools they may attend.* The board of education of the city of Quincy divided the city into eight school districts, and by proper rules provided that no pupil should enter a school out of the district in which he or she resided, without permission of the superintendent, etc. The board also adopted a rule that no pupil of African descent should be permitted to attend any of the public schools of the city other than those designated for their use, and that all the colored pupils in the city should attend a certain public school in said city called the Lincoln school, and no other: *Held*, that the board, under the constitution and laws of the State, had no authority to adopt and enforce the rule in relation to colored pupils. *People ex rel. Longress v. Board of Education of the City of Quincy*, 308.

2. Under the laws of Illinois, aside from the fourteenth amendment of the constitution of the United States, directors of schools and boards of education have no discretion to deny a pupil of the proper age admission to the public schools on account of nationality, color or religion. They all stand equal under the law, and no discrimination in that regard can be made. *Ibid.* 308.

SET-OFF.

WHEN ALLOWED IN EQUITY. See **CHANCERY**, 16.

SETTLEMENTS.**IN ANTICIPATION OF MARRIAGE.**

1. *Of restrictions as to alienation or disposition.* A woman, prior to marriage, may place such restrictions as she pleases upon the future alienation or disposition of her property, not forbidden by or contrary to the policy of the law; and when such restrictions are made to protect the property and herself from the influence of her husband, they will be regarded as of substance, and not of mere form. *Breit et al. v. Yeaton et al.* 242.

SHAREHOLDER.**IN A NATIONAL BANK.**

Who so regarded. See **STOCKHOLDERS**, 7.

SPECIAL LEGISLATION.**WHAT CONSTITUTES.**

1. *As to regulating practice in courts.* A statute for the dissolution of insurance companies for insolvency, etc., and providing the mode of procedure to have such corporations dissolved, which applies alike to all insurance companies, is not a special law regulating the practice in courts of justice, within the prohibition of sec. 22 of art. 4 of the constitution of 1870. *Chicago Life Ins. Co. v The Auditor*, 82.

TERRITORIAL JURISDICTION OF JUSTICES OF THE PEACE.

2. *Act of 1881 re-districting Cook county in reference thereto.* *People ex rel. v. Meech*, 200. See **JUSTICES OF THE PEACE**, 3.

SPECIFIC PERFORMANCE. See **CHANCERY**, 10, 11.

SPLITTING CAUSE OF ACTION.

NOT ALLOWABLE. See **ACTIONS**, 7.

STALE CLAIMS. See **LIMITATIONS**, 9.

STATUTES.**CONSTRUCTION OF STATUTES.**

1. In construing a new statute on any subject, it is proper to consider it with reference to the state of the law before its adoption, and the previous legislation on the same subject. *Wright v. The People*, 126.

2. *Strict construction in regard to right of inheritance of an adopted child.* *Keegan v. Geraghty et al.* 26. See **DESCENTS**, 4.

STATUTES CONSTRUED.

3. *Adopted child—as to his right of inheritance—from whom.* The statute construed in *Keegan v. Geraghty et al.* 26. See **DESCENTS**, 2, 3.

STATUTES. STATUTES CONSTRUED. *Continued.*

4. *Reviewing questions of fact by Supreme Court—extent of the restriction under the statute. Wrought Iron Bridge Co. v. Comrs. of Highways*, 518. See APPEALS AND WRITS OF ERROR, 6, 7.

5. *Corporations—foreign and domestic—right to loan money in this State, and to take real estate security therefor. The general Incorporation law construed in Stevens v. Pratt et al.* 206. See CORPORATIONS, 6 to 11.

6. *Exemption from taxation—what property of institutions of learning is exempt under the statute. Pres. Theolog. Seminary of the Northwest v. The People ex rel.* 578. See TAXATION, 3.

7. *Insolvent Debtors' act—"malice," as the "gist of an action"—within the meaning of the act. First National Bank of Flora v. Burkett*, 391. See INSOLVENT DEBTORS, 1, 2, 3.

8. *Licenses—under the general Incorporation law—power of cities and villages under that law, to require the taking out of licenses for certain occupations and kinds of business. City of Cairo v. Bross*, 475. See CORPORATIONS, 27, 28.

9. *Married Woman's act of 1861—of its application to property held in trust for the wife under a marriage settlement. Breit et al. v. Yeaton et al.* 242. See POWERS, 3.

10. *Right of way of Pittsburg, Ft. Wayne and Chicago Railroad Co.—effect of act of February 8, 1861, as to mode of acquiring right of way.* See HIGHWAYS, 4.

11. *Streets—power of county or town officers to grant use of streets or highways for railroad purposes—under act of 1849. Section 26 of the act construed in Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157. See HIGHWAYS, 2.

STATUTE OF FRAUDS.

TRUST BY PAROL.

1. Where three brothers furnished money to purchase the land of their sister on judicial sale, for the benefit of her children, and one of the brothers bought the land under this arrangement, taking the deed in his own name, to secure himself and two brothers for the money advanced, the promise to hold in trust for the sister's children being verbal only, and it also appearing that the purchaser had made and delivered a deed to such children, which was returned to him to get his wife's signature and release of dower, and was retained by him, it was held, that a court of equity would compel an execution of the trust by a conveyance to the children of the sister. *Wright et al. v. Gay et al.* 233.

STOCKHOLDERS.

LIABILITY FOR DEBTS OF CORPORATIONS.

1. *Changing the conditions as to liability for debts of corporation, by subsequent legislation—under constitution of 1848.* Section 2, art. 10, of the constitution of 1848, which provides that "dues from corporations not possessing banking powers or privileges, shall be secured by such individual liability of stockholders of the corporation, or other means, as may be prescribed by law," was designed to express the reservation of power in the General Assembly in granting charters, to provide, from time to time, by legislation, as experience should suggest or wisdom dictate, for the securing of dues from corporations, by individual liability of the corporators, or by other means. *Weidenger v. Spruance*, 278.

2. The language of the section does not seem necessarily to require that this should be done in the charters, and be made a condition precedent to the exercise of corporate powers, but rather to cast upon the legislature the supervising duty of ascertaining what legislation shall be necessary to attain the desired end, and then to provide it; so that every stockholder in a corporation of a character not within the exception named, organized under that constitution, took his stock subject to this supervisory power of the General Assembly, and to be affected by whatever legislation in that regard the General Assembly might deem necessary. *Ibid.* 278.

3. The 16th section of the general Insurance law of 1869 provides, that "the trustees and corporators shall be severally liable for all debts or responsibilities of such company, to the amount by him or her subscribed, *until the whole amount of the capital of such company shall have been paid in.*" The Commercial Insurance Company was organized under a special charter granted in 1865, which did not prescribe as a condition to the liability of the individual stockholders that the *entire capital* of the company should be paid in, nor did the charter, as considered for the purposes of the decision, contain any reservation to the General Assembly of power to amend it. Nevertheless, that provision of the act of 1869 was given effect as against the corporators or stockholders of the company for liabilities of the corporation accruing after the act went into effect,—and this, by virtue of the reservation of power to the General Assembly, in the constitution, to supervise, in that regard, the affairs of preëxisting corporations. *Ibid.* 278.

4. In giving such effect to the act it was not regarded as an impairment of the obligation of the contract between the prior stockholders and the corporation, or the creditors of the corporation. The act simply required preëxisting corporations to cease to carry on their business unless they should comply with its provisions, and the liability imposed upon the stockholder is by way of penalty, only, for disobedience to this mandate. *Ibid.* 278.

STOCKHOLDERS.

LIABILITY FOR DEBTS OF CORPORATION. *Continued.*

5. But the application of the act in respect to the stockholders of the Commercial Insurance Company is sustainable upon another ground. The charter of the company authorized the directory to call in such an installment on stock subscribed as they might deem necessary,—not less than twenty per cent in cash,—and the balance to be secured in a prescribed manner. Even if there was an implied authority, in the absence of any express grant of power to that effect, for the company to commence or prosecute business before the payment so authorized to be required, was made, still such implied authority but amounted to a license, subject to be revoked, except so far as acted upon, at any time, by the General Assembly. *Weidenger v. Spruance*, 278.

6. But the real obligation of the contract of each subscriber was, that he should pay for his stock. A mere expectation on his part that the law would not be enforced in requiring all the capital stock to be paid in, was not a vested right. It became the duty of the corporation to have payment made into its treasury of its capital stock, and if the stockholders failed to exercise their controlling authority in requiring that duty to be performed, it was competent for the General Assembly to impose a reasonable penalty, such as that prescribed in the act of 1869, for the non-performance of that duty, although the duty may have been declared, and its performance enjoined, by the principles of the common law or the provisions of a prior statute. *Ibid.* 278.

7. "*Shareholder*" in *National Bank*—who so regarded. While it may be true that a bank organized under the National Banking law may not be bound to admit a purchaser of shares of stock in the association to all the rights and liabilities of the prior holder, unless the transfer is made on the books of the bank in the manner prescribed by the by-laws or articles of association, yet where it *does* issue certificates of shares to a subsequent purchaser in lieu of the certificates of the prior owner, without observing its by-laws, so far as creditors of the bank are concerned a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National Banking law. *Laing, Admr. v. Burley*, 591.

SUBSCRIPTION TO STOCK.

8. *Conditions of liability*—as affected by the terms and manner of making subscription to stock of corporation. See CORPORATIONS, 2 to 5.

STREETS.

OF THEIR USE FOR RAILROAD PURPOSES. *Pittsburg, Ft. Wayne and Chicago Railroad Co. v. Reich*, 157. See HIGHWAYS, 1 to 5.

SUBROGATION.

RIGHTS OF A PLEDGEE.

1. *In respect to a mortgage security for the principal debt. Loewenthal v. McCormick et al.* 143. See PLEDGE, 1.

IN FAVOR OF A SURETY.

2. *Who has answered for the debt of his principal.* See SURETY, 2 to 6.

SURETY.

SIGNING BOND ON CONDITION.

1. *Unknown to obligee.* The fact that a party signing an appeal bond as a surety, signed the same and left the bond in the hands of the principal upon condition others were also to execute the same before it should be delivered, and that it was used contrary to such condition, is no defence to the surety in a suit upon the bond, where the obligee is not chargeable with notice of the condition on which it was executed. *Rhode et al. v. McLean*, 467.

AS TO SURETY ON COLLECTOR'S BOND.

2. *Extension of time for payment of taxes—subrogation of surety.* An act of the legislature extending the time of payment of taxes to a collector of the revenue, with the written assent of his sureties, without notice to the General Assembly that others had purchased lands of the collector after the approval and recording of his bond, will not discharge the lien of the State on such lands, nor prevent the collector's sureties answering for his default from being subrogated in equity to such lien. *Crawford et al. v. Richeson et al.* 351.

3. *Effect of surety taking indemnity from his principal, as to his right of subrogation.* The taking of a mortgage by a surety of a collector as an indemnity against loss, is no waiver of any right of subrogation in favor of the sureties to the lien in favor of the State on the collector's lands, where such sureties have been compelled to pay the State for the default of the collector. *Ibid.* 351.

4. *Release by surety of part of his indemnity, without notice of equities in others—effect upon his right of subrogation.* The release by a surety of a county collector of a part of a mortgage given for his indemnification, without notice of the equitable rights of a purchaser of land from the collector which was subject to the lien of his bond, will not defeat the right of this and other sureties of the collector, after having paid judgments against them in a suit on the collector's bond, to be subrogated to the lien created by statute on his lands in favor of the State. *Ibid.* 351.

5. *Right of surety to require lien against principal's land to be first enforced.* The sureties upon a collector's bond have the right in equity, upon the recovery of a judgment against them upon the bond, and before its payment by them, to file a bill and require the lands of

SURETY. AS TO SURETY ON COLLECTOR'S BOND. Continued.

the collector subject to the lien of his bond, though they have passed into the hands of innocent purchasers, to be sold for the payment of such judgment, and upon supplemental bill showing payment of the judgment, to be subrogated to the lien of the State, and have the lands sold for their reimbursement. *Crawford et al. v. Richeson et al.* 351.

6. *Sale of lands subject to lien, in inverse order of alienation.*

Where a statutory lien, as that of a collector's bond, attaches to land, a part of which was acquired after the recording of the bond, and such lands have been sold and conveyed by the collector to different persons and at different times, it is proper to order their sale in the inverse order of their alienation, on bill by his sureties to be subrogated to the lien of the State, and this without regard to the times of acquiring the title to the different parcels which were purchased after the recording of the collector's bond. *Ibid.* 351.

TAXATION.**WHO IS LIABLE FOR TAXES.**

1. *As owner.* Where commission merchants were to furnish money to country dealers with which to purchase grain, who were to pay ten per cent interest for the use of the money until it was paid, and the commission merchants were to receive one cent a bushel as commission in handling and selling the same, the country dealers to pay all expenses, and have all the net profits, and bear the losses, if any, and to turn over the grain, when bought, to the agent of the parties advancing the money: *Held*, that the transaction between the two firms was a loan of money by the former, with a security on the grain for its repayment, and that the grain belonged to the latter firm, and was properly assessed and taxed to them. *Lyle v. Jacques et al.* 644.

ASSESSMENT—MISTAKE IN OWNER'S NAME.

2. *Will not vitiate tax.* An error or informality in assessing a lot of grain belonging in fact to a firm, in the name of C. M. Jacques & Co. instead of Jacques Bros. & Co., the proper name, the two firm names representing really the same persons, will not invalidate the tax, or furnish any ground for enjoining its collection from the firm. Equity will not interfere because of mere errors in the assessment, where the tax is authorized by law, and is upon property subject to taxation. *Ibid.* 644.

INSTITUTIONS OF LEARNING—EXEMPTION.

3. *What property of institutions of learning is exempt.* Land belonging to an institution of learning upon which the buildings or "institutions" are not located, and which is not shown to be "used exclusively" for the interests of the corporation, is subject to taxation, and is not exempt, under the present legislation. *Pres. Theolog. Seminary of the Northwest v. The People ex rel.* 578.

TAXATION. *Continued.*

APPLICATION FOR JUDGMENT.

4. *Personal judgment for taxes—its effect upon the lien—and the right to a judgment against the land.* The recovery of a personal judgment by the State against the owner of real estate for taxes due thereon, does not discharge the lien given by the statute for such taxes, and hence is no bar to an application by the collector for judgment against the property. The State may have a personal judgment against the owner for the taxes, and at the same time, or at any other time, enforce payment against the land itself by a proceeding *in rem*; but the payment of either judgment will be a satisfaction of both. *People v. Stahl*, 346.

NOTICE OF SALE FOR TAXES.

5. *Sufficiency—as to the place.* A collector's notice of the sale of property for taxes described the property, which was bulky and not movable readily, as standing on a certain fractional quarter section, and that the sale would be at R., in W. county, and the evidence showed that the quarter section was within the limits of the town of R., which was east and west one mile in length, and north and south one-half mile in extent, and containing 1000 inhabitants: *Held*, that from the character of the property the reasonable understanding from the notice was, that the sale was to be at the place in R. where the property was described as standing. *Lyle v. Jacques et al.* 644.

TENDER.

WHAT IS ADMITTED THEREBY.

1. *And as to the tender of a deed.* A tender of any kind is only an admission to its extent, and no further. When made it only admits the fact of the tender, with all of the conditions, limitations and terms at the time imposed. Therefore the tender of a deed for land or interest therein binds the party making it to its terms and conditions, and no further. *Brix v. Ott*, 70.

TOWN MEETING.

AS DISTINGUISHED FROM AN ELECTION.

1. The words "town meeting" have a definite and well settled meaning in the Township law, and are always used to describe the annual town meetings of the electors of the town for the purpose of electing town officers, and transacting such other business as the electors are authorized to transact, or special meetings of the electors for such purposes called pursuant to law. Such meetings are clearly distinguishable from "elections," when there is no other business transacted but to elect officers. *Chicago and Iowa Railroad Co. et al. v. Mallory et al.* 583. See MUNICIPAL SUBSCRIPTIONS AND BONDS, 1.

TRUSTS AND TRUSTEES.

WHETHER A TRUST EXISTS.

1. *Parol evidence thereof.* Where a person at a sale of land becomes the purchaser under the promise to hold for the benefit of the children of the former owner upon being repaid the sum advanced by him, this is sufficient to raise a trust in favor of such children on the ground of fraud, and this may be proved by parol. *Wright et al. v. Gay et al.* 233.

TRUST BY PAROL—STATUTE OF FRAUDS.

2. Where three brothers furnished money to purchase the land of their sister on judicial sale, for the benefit of her children, and one of the brothers bought the land under this arrangement, taking the deed in his own name, to secure himself and two brothers for the money advanced, the promise to hold in trust for the sister's children being verbal only, and it also appearing that the purchaser had made and delivered a deed to such children, which was returned to him to get his wife's signature and release of dower, and was retained by him, it was held, that a court of equity would compel an execution of the trust by a conveyance to the children of the sister. *Ibid.* 233.

STRANGER TO A TRUST FUND.

3. *Whether chargeable as a trustee.* To charge a stranger to a trust fund as a trustee, by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was at the time aware that the debt paid by it was in fact a private debt, or such a debt that payment thereof could not lawfully be made out of such fund. *Fifth National Bank v. Village of Hyde Park*, 595.

DIVERTING TRUST DEPOSIT IN BANK.

4. *On check for private use of depositor—liability of the bank.* If a depositor pays his own debt to a banker by a check upon funds to his credit in a fiduciary capacity, the banker will be affected with knowledge of the unlawful character of the appropriation, and will be compelled to refund to the *cestui que trust*; but the debt paid must be such as that the officers of the bank are aware that the same is really and in truth the private debt of such depositor. *Ibid.* 595.

5. A treasurer of a village borrowed money of a bank on his own note, secured by valuable collaterals, professing at the time to be borrowing the same for the village to pay off its warrants in anticipation of the collection of its taxes, and such money was placed to his account in bank as treasurer, and most of it applied in payment of village warrants, and after the receipt of the taxes he gave the bank a check upon the trust fund in payment of his note, and the bank in good faith, believing the debt to have been incurred for the village, accepted the payment and surrendered the note and collaterals: *Held*, that the pay-

TRUSTS AND TRUSTEES.**DIVERTING TRUST DEPOSIT IN BANK. *Continued.***

ment could not be rescinded by the village, and the bank be held responsible for the money so paid it. *Fifth National Bank v. Village of Hyde Park*, 595.

PURSuing A TRUST FUND,

6. *Charging property purchased with trust funds with original trust.* The doctrine is well settled that a *cestui que trust* may pursue the proceeds of trust property, and charge with the original trust any property in which they may be invested, as against all who have actual or presumptive notice of the trust. *Breit et al. v. Yeaton et al.* 242.

7. *Taking such action is optional with cestui que trust.* Where property is bought with trust funds, in violation of the trust, a trust will not absolutely and at all events attach to the property purchased. The *cestui que trust* will have the right to have it attach, or he may repudiate the trust, and disclaim any title to the property, and proceed upon any other remedies he is entitled to, either *in rem* or *in personam*. *Ibid.* 242.

8. *The right must be exercised in reasonable time.* In case of an optional right to defeat or divest a title, or to charge property with trusts, the party entitled to the option must, when aware of his right, exercise it promptly, and not, by delay and inattention, give reason for the belief that he has abandoned it. *Ibid.* 242.

PARTITION OF PROPERTY HELD IN TRUST.

9. *Effect as to parties having right to property as cestuis que trust.* Where a trust attaches to land held in common, a subsequent partition by the holder of the legal title will give no new title, but will only change the title to one in severalty, and the trust may be enforced against the part so set off in severalty. *Ibid.* 242.

TRUSTEE'S DEED.

10. *Condition precedent—how far essential—effect of recitals in the deed.* A party claiming title under a trustee's deed must show that every condition precedent to the vesting of the estate has been complied with, and where the power of a trustee to convey depends upon a written request of another, under seal, and attested by three or more credible witnesses, it is incumbent on those claiming under the deed of the trustee to show that such a written request was executed and attested, as required. The evidence of the performance of the condition precedent may probably be preserved by recitals in the trustee's deed. *Ibid.* 242.

EVIDENCE—OF USE OF TRUST FUND.

11. *By recital in deed.* See EVIDENCE, 17.

NOTICE—BY RECITALS IN DEED.

12. *As to investment of trust funds—notice to purchasers.* See NOTICE, 2.

USURY.

WHETHER A CONTRACT IS USURIOUS.

1. *As to money advanced—reserving a share of profits and sharing in losses.* Where a party advances to another capital with which to engage in business in the name of the former, under an agreement that the party carrying on the business is to receive \$50 per month, and each is to receive one-half of the net profits, subject to losses, the transaction is not usurious, though the lender may thereby in fact receive more than the rate of interest allowed by law to be reserved, on his advance, as he takes the hazard of a loss from the business. *Goodrich et al. v. Rogers et al.* 523.

2. Where a loan is made and the lender receives a share of the profits in an adventure, which is greater than the legal rate of interest, but is responsible for losses, the transaction is not usurious, though it might be so regarded if he were not liable for losses. *Ibid.* 523.

VARIANCE. See PLEADING AND EVIDENCE.

VOID AND VOIDABLE.

LEASE BY AN INFANT.

Only voidable. See INFANTS, 3.

WATER COURSES.

RIGHTS OF RIPARIAN OWNERS.

1. *Extent of their ownership of the stream.* A stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its center thread, unless the grant shows a contrary intention; and the only right the public has therein is an easement for the purpose of navigation. If the same person is the owner on both sides of a river, he owns the whole stream to the extent of the length of his lands upon it. This is the rule of the common law, which has been adopted in this State. *Washington Ice Co. v. Shortall*, 46.

2. *Rights as to use of the water.* A riparian owner has rights with respect to water in a running stream, which authorize the actual taking of a reasonable quantity of the water for his own use for domestic, manufacturing and agricultural purposes. The limitation in extent of the use of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish or impair the right of use of the water by a lower or upper proprietor, as it passes along his land. *Ibid.* 46.

3. *Right of riparian owner to ice on stream over his land.* The just and reasonable use of the water which belongs to the riparian proprietor, in case of its being congealed into ice, would give him the unlimited use and appropriation of the ice as his exclusive property, of which he can not be deprived by a mere wrongdoer. The ice may be regarded

WATER COURSES. RIGHTS OF RIPARIAN OWNERS. *Continued.*

as attached to the soil, and, like any other accession, may be considered as a part of the realty, and any stranger who enters upon the same and appropriates the ice to his own use, will be liable to the owner in trespass *quare clausum fregit*. *Washington Ice Co. v. Shortall*, 46.

4. *Measure of damages—for taking and removing ice from stream over the land of another.* See MEASURE OF DAMAGES, 1.

WIDOW.

WHERE THE WIDOW RETAINS POSSESSION.

1. *After sale of land by the administrator—duty of the widow, and rights of the purchaser.* *Doane v. Walker*, 628. See PURCHASERS, 2.

WIDOW'S QUARANTINE.

2. *How lost, etc.* See DOWER, 1 to 4.

WILLS.

ON BILL TO ESTABLISH A WILL—EVIDENCE.

1. *In a case where the will has been destroyed—of the proof required.* Where a will duly executed and attested was destroyed, with the connivance of a part of the heirs of the testator, and no copy appearing to be in existence, in a suit by a devisee not a party to such destruction, to establish the will, it was *held*, that the latter was only required to show, in general terms, the disposition which the testator made of his property by the instrument, and that it purported to be his will, and was duly attested by the requisite number of witnesses. *Anderson et al. v. Irwin*, 411.

2. Under such circumstances, proof of the sanity of the testator is not indispensable in the absence of any proof that he was not in his sound mind, and in such case the disposition made by him of his property may of itself afford sufficient evidence of his sanity. *Ibid.* 411.

CONSTRUCTION OF DEEDS AND WILLS.

3. *The intention must prevail.* See CONVEYANCES, 1.

WITNESSES.

COMPETENCY.

1. *As to a party as a witness.* The exception in favor of heirs, in the statute making parties in interest competent to testify, was made for the benefit of the heirs themselves, and not for the benefit of strangers who are in nowise identified in interest with them. *Walsh et al. v. Wright*, 178.

2. On bill for the specific performance of a parol contract for the sale of land against a minor heir of the alleged vendor, the adult heirs having conveyed, and also to set aside a sheriff's deed to another, made on a sale under execution issued upon a judgment recovered after the sale to

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WITNESSES. COMPETENCY. *Continued.*

the complainant, and possession taken, the suit was dismissed as to the minor heir, and a hearing had as against the holder of the sheriff's deed: *Held*, that the complainant was a competent witness, after such dismissal, as to the minor heir, no relief being thereafter sought as against the heir. *Walsh et al. v. Wright*, 178.

CREDIBILITY.

3. *When contradictory statements are shown.* Although contradictory statements by a witness as to immaterial matters may tend to cast suspicion upon his testimony, they will not authorize its entire rejection, when he is corroborated by another witness, and not contradicted by any other evidence in the case. *Smith et al. v. Dennison, Receiver*, 531.

4. *To impeach a witness* it must be shown that he willfully and knowingly testified falsely to a material fact, and even then the jury are not compelled to disbelieve him as to other matters. They may do so, but should be left to exercise their judgment in that regard. *Pennsylvania Co. v. Conlan*, 93.

5. *Defendant in criminal case testifying in his own behalf.* The jury in a criminal case are not bound to believe the testimony of the defendant, any further than it may be corroborated by other credible evidence, and there is no impropriety in so instructing them. *Hirschman v. The People*, 568.

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